# THE
# Compleat Sheriff
## IN
# Theory and Practice;

SHEWING

The IMPORTANCE, NATURE, and DUTY,

OF THAT

# HIGH OFFICE;

AND ALSO

That of the *Under-sheriff*, *Bailiff*, and other subordinate Officers, in executing Process, taking Bail, collecting Fines due to the King, *&c.*

With Precedents of

All Manner of Writs used and brought on Suits prosecuted in the *Sheriff's County-courts*, *Court of Tourn*, and *Hundred Court*, taken from the *Register of Writs*.

To which is added,

## The Office and Duty of a Coroner.

The whole illustrated with

Apt CASES of PRACTICE on the different Heads; selected from the most modern *Law* and *Equity Reporters*

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# ADVERTISEMENT.

THIS Volume, on peruſal, will be found to contain, not only ALL that has been hitherto offered on this Subject in various Publications, but a Variety of NEW MATTER, particularly the Forms of all ſuch Writs as are now uſed and brought for proſecuting Suits in the different Courts ſubordinate to the Sheriffs, with proper Explanations of the ſame; and apt Inſtructions to YOUNG CLERKS and PRACTITIONERS for ſuing out and executing ſuch Proceſs with Safety and Effect.

*January* 1, 1777.

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FINIS.

# THE

# Duty of High Sheriffs,

## And their Subordinate Officers.

### HIGH SHERIFF.

THE government of the different counties was anciently lodged, by the King, in the earl of each reſpective county; who was the immediate officer under the crown; and this high office was granted by the King, ſometimes for life and afterwards in fee; but when it became too burthenſome, and could not be conveniently executed by a perſon of ſo high rank, it was found neceſſary to appoint a perſon duly qualified to officiate in his room, who is called *ſheriff*, from *ſhire reeve*, *i. e.* governor of the ſhire.

The ſheriff is therefore at this day conſidered as an officer of great antiquity, truſt, and authority, having all the power for the adminiſtration and execution of juſtice which the earl formerly had.

#### *Perſons qualified to ſerve this office.*

IT is by ſeveral ſtatutes enacted, that no perſon ſhall be ſheriff in any county, unleſs he has ſufficient lands within the ſame county where he ſhall be ſheriff, whereof to anſwer the King and his people, in caſe any complaint be made againſt him; and none that is ſteward or bailiff to a nobleman ſhall be choſen ſheriff.

#### *Thoſe diſqualified.*

DISSENTERS cannot be compelled to ſerve the office of ſheriff, for every recuſant is under a legal diſability; as alſo excomunicated perſons; excomunication, however, will not ſave the perſon from puniſhment for not taking on him this office, if it is in his power to get himſelf abſolved therefrom; likewiſe perſons who are diſabled by a judgment in law to bear an office, are excuſed.

By a *bye-law* of the city of *London*, no freeman thereof choſen ſheriff ſhall be excuſed, unleſs he voluntarily makes oath, that he is not worth 10,000*l.* or pays the fine, being 400*l.*

# Duty of High Sheriff.

## *How appointed*, &c.

BEFORE the ſtatute 9 *Edw.* 2. ſheriffs were annually elected by the freeholders of the county in the ſame manner as coroners are at preſent; but by that ſtatute, the chancellor, treaſurer, and judges, are directed to meet on the morow of *All Souls*, being 3d *November*, every year, in the Exchequer Chamber, who, when aſſembled, are to nominate three perſons in every county to be preſented to the King, who pricks one to be ſheriff of each county; in *London* and *Middleſex* they are elected on Midſummer-day, by the livery of *London* in their common hall.

Sheriffs in the principality of *Wales* are nominated yearly by the lord preſident, council, and juſtices thereof, who certify the ſame above, when they are appointed by the King as other ſheriffs.

The ſheriff before he can exerciſe his office, or can have his patent, muſt give ſecurity in the King's Remembrancer's Office, under penalty of 100*l.* for the payment of his proffers, and all other profits of his office; but ſuch ſureties are never ſued, unleſs there is a deficiency in his effects.

By ſtatutes 1 *Geo.* 2. 2 *Geo.* 2. and 9 *Geo.* 2. he is, within ſix calendar months after his election, to take and ſubſcribe the oaths of allegiance, ſupremacy, and abjuration, in one of the courts at *Weſtminſter*, or at the general or quarter ſeſſions where he reſides, between the hours of nine and twelve o'clock in the forenoon; he is alſo, within three months after he is elected into his office, to receive the ſacrament in ſome public church, on the Lord's-day, immediately after ſermon; and muſt produce, in the court where he takes the oaths, a certificate of his receiving the ſacrament, under the hands of the miniſter and church-wardens, which muſt be authenticated by the oath of two witneſſes.

By ſtat. 25 *Car.* 2. 3 *Geo.* he muſt alſo, before he exerciſes his office, make and ſubſcribe the declaration againſt tranſubſtantiation, and make an oath, that he will duly according to the laws of the land execute his ſaid office.

## *Oath of allegiance.*

I *W. W.* do ſincerely promiſe and ſwear, that I will be faithful and bear true allegiance to his Majeſty King *George*. So help me God. Stat. 1 *Geo.*

## *Oath of ſupremacy.*

I *W. W.* do ſwear, That I do from my heart abhor, deteſt, and abjure, as impious and heretical, that damnable doctrine and propoſition, that princes excommunicated or deprived by the Pope, or any authority of the ſee of *Rome*, may be depoſed or murdered by their ſubjects, or any other whatſoever; and I do declare, that no foreign prince, perſon, prelate, ſtate, or potentate, hath, or ought to have, any juriſdiction, power, ſuperiority, pre-eminence, or authority, eccleſiaſtical, or ſpiritual, within this realm. So help me God. Stat. 1 *Geo.*

## *Oath of abjuration.*

I *W. W.* do truly and ſincerely acknowledge, profeſs, teſtify, and declare in my conſcience, before God and the world, That our ſovereign lord King *George*, is lawful and rightful King of this realm, and all other his Majeſty's dominions thereunto belonging; and I do ſolemnly and ſincerely declare, that I do believe in my conſcience, that the perſon pretended to be prince of *Wales* during the life of the late King *James*, and ſince his deceaſe pretending to be, and taking upon himſelf the ſtile and title of the King of *England*, by the name of *James* the Third, or of *Scotland* by the name of *James* the Eighth, or the ſtile and title of King of *Great Britain*, hath not any right or title whatſoever to the crown of this realm, or any other the dominions thereto belonging; and I do renounce, refuſe, and abjure, any allegiance or obedience to him; and I do ſwear, that I will bear faith and true allegiance to his Majeſty King *George*, and him will defend, to the utmoſt of my power, againſt all traiterous conſpiracies and atttempts whatſoever, which ſhall be made againſt his perſon, crown, or dignity; and I will do my utmoſt endeavour to diſcloſe and make known to his Majeſty and his ſucceſſors, all treaſons and traiterous conſpiracies which I ſhall know to be againſt him or any of them; and I do faithfully promiſe to the utmoſt of my power, to ſupport, maintain, and defend the ſucceſſion of the crown againſt him the ſaid *James*, and all other perſons whatſoever; which ſucceſſion by an act entitled, "An act for the further limitation of the crown, and better ſecuring the rights and liberties of the ſubject," is and ſtands limited to the princeſs *Sophia*, electoreſs and dutcheſs dowager of *Hanover*, and the heirs of her body, being proteſtants; and all theſe things I do plainly and ſincerely acknowledge and ſwear, according to theſe expreſs words by me ſpoken, and according to the plain and common ſenſe and underſtanding of the ſame words, without any equivocation, mental evaſion, or ſecret reſervation whatſoever; and I do make this recognition, acknowledgment, abjuration, renunciation, and promiſe, heartily, willingly, and truly, upon the faith of a chriſtian. So help me God. Stat. 1 *Geo.*

## *Declaration againſt tranſubſtantiation.*

I *W. W.* do declare, That I do believe that there is not any tranſubſtantiation in the Sacrament of the Lord's Supper, or in the elements of bread and wine, at or after the conſecration thereof by any perſon whatſoever. Stat. 25 *Car.* 2.

## *Oath of office taken by ſheriffs, except in* Wales, *and the county palatine of* Cheſter.

I *W. W.* do ſwear, That I will well and truly ſerve his Majeſty in the office of ſheriff of the county of —— and promote his Majeſty's profit in all things that belong to my office, as far as I legally can or

may. I will truly preſerve the King's rights, and all that belongeth to the crown. I will not aſſent to decreaſe, leſſen, or conceal, the King's rights, or the rights of his franchiſes; and whenſoever I ſhall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchiſes, ſuits, or ſervices, or in any other matter or thing, I will do my utmoſt to make them be reſtored to the crown again; and if I may not do it myſelf, I will certify and inform the King thereof, or ſome of his judges. I will not reſpite or delay to levy the King's debts for any gift, promiſe, reward, or favour where I may raiſe the ſame, without great grievance to the debtors. I will do right as well to poor as to rich, in all things belonging to my office: I will do no wrong to any man for any gift, reward, or promiſe, nor for favour or hatred: I will diſturb no man's right, and will truly and faithfully acquit at the Exchequer all thoſe of whom I ſhall receive any debts or duties belonging to the crown: I will take nothing whereby the King may loſe, or whereby his right may be diſturbed, injured, or delayed: I will truly return, and truly ſerve, all the King's writs, according to the beſt of my ſkill and knowledge: I will take no bailiffs into my ſervice, but ſuch as I will anſwer for, and will cauſe each of them to take ſuch oaths as I do in what belongeth to their buſineſs and occupation: I will truly ſet and return reaſonable and due iſſues of them that be within my bailiwick, according to their eſtate and circumſtances, and make due panels of perſons able and ſufficient, and not ſuſpected, or procured, as appointed by the ſtatutes of the realm: I have not ſold or let to farm, nor contracted for, nor have I granted, or promiſed for reward or benefit, nor will I ſell or let to farm, nor contract for, or grant for reward or benefit, by myſelf or any other perſon for me, or for my uſe, directly or indirectly, my ſheriffwick, or any bailiwick thereof, or any office thereunto belonging, or the profits of the ſame, to any perſon or perſons whatſoever: I will truly and diligently execute the goods, laws, and ſtatutes of this realm, and in all things well and truly behave myſelf in my office for the honour of the King, and the good of the ſubjects, and diſcharge the ſame according to the beſt of my ſkill and power. So help me God. Stat. 3 *Geo.*

The ſheriffs for *Wales*, and the county palatine of *Cheſter*, take the old accuſtomed oath, theſe words being omitted;

> "Ye ſhall be dwelling in your own proper perſon, within your bailiwick for the time as ye ſhall continue in the ſame office, except ye be otherwiſe licenſed by the King."

If a ſheriff refuſes to take on him his office, he may be proceeded againſt by information in the King's Bench; and if he refuſes to take the oaths enjoined him, or exerciſes his office before he is thus qualified, the court of King's Bench, who have a general ſuperintendancy over all officers of juſtice, will grant an information againſt him.

After he has entered into a recognizance in the Remembrancer's Office, with ſureties for payment of his proffers or accounts, his attorney, &c. writes a note ſignifying that he is choſen ſheriff of ſuch a county, and has entered into a recognizance, which muſt be delivered

to

to one of the ſix clerks in Chancery to draw his patent by, with the writ of aſſiſtance, and writ of diſcharge to his predeceſſor, and then he muſt go to a Maſter in Chancery, if he be in *London*, to take the oaths.

If not in *London*, he may take the oaths by *dedimus poteſtatem*, directed to any two juſtices of the county where he is ſheriff, one to be of the *quorum*, or to any other commiſſioner or commiſſioners, or before a judge of aſſize for the county, or a maſter in Chancery, who, it is held, may as well as a judge adminiſter to him the oath without *dedimus*. If the commiſſioners return the commiſſion or writ, and the oaths to be taken, when they are not taken, ſuch commſſioners are finable.

*Form of return of* dedimus *to take ſheriff's oath by commiſſion indorſed on the back of* dedimus.

WE have taken the oath of the within-mentioned *W. W.* Eſq; ſheriff of —— by virtue of this writ to us directed (time when *dedimus* bears date) truly and faithfully to execute the office of ſheriff, as well according to the form of a certain ſchedule to theſe preſents, as to the tenor of the writ and ſchedule of the writ aforeſaid, likewiſe annexed, as that writ orders and directs.

*Priſoners, Writs,* &c. *how turned over by the old ſheriff to the new one.*

THE new ſheriff, at or before his firſt county court, muſt take over from his predeceſſor all his priſoners and writs preciſely by view, by indenture to be made between them, in which indenture all the cauſes which he has againſt every priſoner muſt be ſet forth, and delivered by ſuch indenture, or the new ſheriff is not charged therewith.

*Form of the indenture for ſetting over priſoners and writs between the old and new ſheriff.*

THIS INDENTURE made, *&c. between C. D.* of, *&c.* late ſheriff of the county of *S.* of the one part, and *W. W.* of, *&c.* now ſheriff of the ſaid county of the other part, WITNESSETH, that the ſaid late ſheriff has delivered, and the ſaid preſent ſheriff has received from the ſaid late ſheriff, at the time of his going out of his office, the bodies of the ſeveral perſons hereafter named, charged with the cauſe or cauſes hereafter-mentioned; That is to ſay, *G. T.* was taken by *J. S.* the ——— day of ———, in the year of our Lord ———, by virtue of (*the proceſs he was taken on, and ſo ſtate the ſeveral priſoners in cuſtody, with their cauſes of action for which they are detained.*) In witneſs, *&c.*

*Goaler's*

*Goaler's certificate engroſſed at the bottom of the indenture.*

I Hereby acknowledge to have in my cuſtody the bodies of all the ſeveral priſoners herein before-named, except *E. F. G. H. &c.* againſt whoſe names the word *diſcharged* is written in the margin of this deed, the priſoners in cuſtody being in number ———. Witneſs my hand, *&c.*

Witneſs *B. F.*
*A. Z.*
*J. K.*

When a ſheriff is choſen, the old one continues ſheriff till the new one is ſworn in; but his office ceaſes as ſoon as the writ of diſcharge comes to him.

A ſheriff cannot be elected a knight of the ſhire for the county for which he is ſheriff.

He is, by virtue of his office, a *conſervator of the peace*; yet by ſtat. 1 *Mary*, no perſon being ſheriff of a county can exerciſe the office of juſtice of peace in ſuch county during the time he is ſheriff.

By ſtat. 1 *Rich.* 2. No one who has been ſheriff of a county a year, ſhall be choſen again into ſuch office within two years, if there be other ſufficient perſons. This is confirmed by ſtat. 23 *Hen.* 6.

At common law the ſheriff's patent of office, like all other commiſſions, ceaſed on the death or demiſe of the King; but by ſtat. 7 *Will.* and *Mary*, and 2 *Ann.* they remain in full force for the ſpace of ſix months after ſuch death or demiſe, unleſs ſuperſeded or made void by the next ſucceſſor to the crown.

By ſtatute 4 *Hen.* 4. every ſheriff muſt dwell in his proper perſon within his bailiwick while he continues in office.

His being ſheriff in one county, gives him no juriſdiction in any other, though as a miniſterial officer he may make a panel, or return a writ out of his county.

By ſtatute 23 *Hen.* 6. a ſheriff ſhall not let to farm in any manner his county of which he is ſheriff, nor any of the bailiwicks, hundreds, or wapentakes therein.

A leaſe from a ſheriff of his county, or any part thereof, though no rent ever received, is deemed to be within the foregoing ſtatute.

By ſtatute 3 *Geo.* 1. a high ſheriff may conſtitute an under ſheriff or deputy ſheriff, or he may execute the office himſelf.

*Adjudged caſes on the office and duty of high ſheriff.*

DISSENTERS cannot be compelled to ſerve the office of ſheriff. *Adjudged in the houſe of lords, City of* London *againſt* Evans, *in* 1766.

The ſheriff can execute no other office during the time of his ſheriffaltry. *Stat.* 2. *Mary* 1.

The office of ſheriff does not determine on the party's becoming a peer, but he ſtill continues ſheriff at the King's pleaſure. *Cro. Eliz.* 12,

A ſheriff

A sheriff cannot appoint two under sheriffs. *Vin. Abr.* 19. &c.

Every sheriff of shires, not being cities or towns made shires, shall, within two months after he has received his patent, on his first county court-day, proclaim in the shire town four deputies residing not more than twelve miles from each other, who are empowered to make replevins, and other matters of distress in the sheriff's name; and sheriff is to forfeit 5 *l.* for every month he shall neglect so to do, one half of the forfeiture to the King, the other moiety to the prosecutor. *MSS. Case adjudged on stat.* 1 & 2 *Phil. & Mary.*

By stat. 23 *Hen.* 6. 1 *Edw.* 6. 5 & 6 of *Edw.* 6. and 31 *Eliz.* every sheriff must appoint a deputy in the courts of law and equity to receive all writs and warrants before he begins to execute the judicial part of his office, under forfeiture of 40 *l.* and treble costs; and the above statutes have been enforced by the superior courts. See *Rule K. B. Mich.* 1645, and *Rule C. P. Mich.* 1654.

Prisoner may be assigned by the old sheriff to the new one, by deed-poll as well as indenture, but the new sheriff may insist on the assignment being made by indenture, if he thinks proper. *Barnes's Notes, C. P.* 259.

It has been adjudged, that it is not a good delivery of prisoners by the old sheriff to the new one, till they are brought by him to be viewed by such sheriff, which he is not bound to take but in the county goal. *Hard.* 33.

The new sheriff is not answerable for the escape of any prisoner till he is properly made over to him by the old sheriff; when made over, his charge of such prisoner commences *instanter*. 2 *Roll. Abr.* 457.

If a prisoner is omitted in the indenture, and so not turned over at all, he remains in the custody of the old sheriff; and if he escapes, the action must be brought against such old sheriff. 2 *Keb. Rep.* 224.

A sheriff cannot be compelled to return any writ or process, unless same is done within six months after the expiration of his office. *MSS. Case, on stat.* 20 *Geo.* 2.

The old sheriff is in law considered as sheriff of the county till the new one is sworn in. 2 *Lill. Abr.* 633.

The King can determine the office of sheriff when he pleaseth; but, while in office, he cannot abridge his power. 4 *Bac. Abr.* 431.

A sheriff for any neglect of his *under-sheriff*, in the execution of the office of sheriff, is answerable in the Exchequer; but cannot be imprisoned or indicted for the same. *Latch.* 131.

If a sheriff is amerced by the court for neglect or refusal to do his office, such amerciament may be encreased by the court till he complies. These amerciaments may be remitted on motion of the injured party to the court, if not estreated into the *Exchequer*, otherwise not. *Lill. Abr.* 88.

By *common law* the sheriff is a subordinate officer to the King's Bench, in the same manner as a constable is to a justice of peace. 2 *Lord Raymond* 1195

All writs executed in the former sheriffalty, though included in the indenture and schedule to the new sheriff, must be returned by or in the

the name of the old ſheriff, and the return ſubſcribed by the new ſheriff. *MSS. Note.*

The courts at *Weſtminſter* will not grant attachment againſt a ſheriff for contempt after the expiration of his office, becauſe being then no officer, and not liable to be fined, in the opinion of the courts, to impriſon ſuch a perſon would be an arbitrary proceeding; but will ſend for him to anſwer for a miſdemeanor committed by him when in office, and a *diſtringas nuper vicecomiti* may iſſue againſt him for the ſame. 2 *Brownl.* 144. 2 *Saunders* 88.

Pending demiſe of the King, and before patent is renewed, if a priſoner eſcape, an action will lie againſt the ſheriff for the ſame. 7 *Co.* 30.

If ſheriff dies before his year is expired, his under ſheriff muſt execute the office till another is appointed, and is anſwerable to the King, and all others during the interval. *MSS. Caſe on ſtat.* 3 *Geo.* 2.

If ſheriff takes a bribe of any under ſheriff, bailiff, gaoler, *&c.* for his place, he is liable to an indictment, fine or impriſonment. This reſtriction extends to *London* and *Middleſex.* MSS. Caſe, on ſtat. 5 Ann.

An action on the caſe will lie againſt a ſheriff for entering a corporation empowered to return writs. *Roll. Rep.* 119.

An action lies againſt a ſheriff if he is ſeen in the company of a perſon againſt whom he has a writ, and afterwards returns the ſame *non eſt inventus*, or if he is ſhewn defendant, and does not arreſt him, or if he does not attach the goods of a defendant, having an opportunity to execute ſuch warrant. *Cro. Eliz.* 873. 3 *Bulſ.* 212.

An action lies againſt the ſheriff if he refuſes to return the perſon coroner who is legally choſen by a majority. 2 *Vent.* 26.

An action alſo lies againſt him for not returning good iſſues on a *diſtringas*; and alſo for refuſing a writ. 12 *Mod.* 494, 495.

The ſheriff may be amerced for the default of his under ſheriff or bailiffs in the Exchequer. *Brownl.* 36.

If the party arreſted on a *Latitat* does not appear after the uſual return made, the ſheriff may be amerced; but ſuch amercement may be taken off if the defendant appears within a week after the return of the writ. *Lit. Abr.* 83.

Sheriff may be amerced for not returning the writ where debt is levied on *fieri facias*, and paid to the plaintiff; but ſuch levy and ſale are legal. *Compl. Sher.* 417.

If ſheriff has a court by preſcription, and has been accuſtomed to execute proceſſes therein, no action lies againſt him for any act done by him on ſuch proceſs, becauſe in that caſe the law conſiders him as a judge of the court. *MSS. Note.*

The ſheriff muſt execute the office himſelf in the following caſes: Writ of *Partition*, *Redisſeiſin*, *Waſte*, *Juſticies*. And wherever the words of the writ are, *that the ſheriff ſhall go in perſon*, as in an *accedas ad curiam*, &c.

The further part of the *ſheriff's* duty will be taken notice of under the head of *Under Sheriff.*

First,

## UNDER SHERIFF.

### *How appointed.*

THIS officer is in fact only the deputy of the ſheriff, who can grant this office, and revoke ſuch appointment at will.

By ſtat. 3 *Geo.* all under ſheriffs of any counties in *England*, except the *Welch* counties, and the county palatine of *Cheſter*, before they enter on their offices, ſhall take the following oath, before commiſſioners appointed to adminiſter the high ſheriff's oath, where a *dedimus* for a commiſſion iſſues, or b fore the Barons of the *Exchequer*, or ſome one of them, when the under ſheriff is ſworn in town.

### *Oath of office.*

I *T. C.* do ſwear, That I will well and truly ſerve the King's Majeſty in the office of under ſheriff of the county of ———, and promote his Majeſty's profit in all things that belong to the ſaid office, as far as I legally can or may; I will preſerve the King's rights, and all that belongeth to the crown; I will not aſſent to decreaſe, leſſen, or conceal the King's rights, or the rights of his franchiſes; and whereſoever I ſhall have knowledge, that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchiſes, ſuits or ſervices, or in any other matter or thing, I will do my utmoſt to make them be reſtored to the crown again; and if I may not do it of myſelf, I will certify and inform ſome of his Majeſty's judges thereof; I will not reſpite or delay to levy the King's debts for any gift, promiſe, reward, or favour, where I may raiſe the ſame without great grievance to the debtors; I will do right as well to poor as to rich, in all things belonging to my office; I will do no wrong to any man for any gift, reward, or promiſe, nor for favour, or hatred; I will diſturb no man's right, and will truly and faithfully acquit at the Exchequer all thoſe of whom I ſhall receive any debts, duties, or ſums of money belonging to the crown; I will take nothing whereby the King may loſe, or whereby his right may be diſturbed, injured, or delayed; I will truly return and truly ſerve all the King's writs, to the beſt of my ſkill and knowledge; I will truly ſet and return reaſonable and due iſſues of them that be within my bailiwick, according to their eſtates and circumſtances, and make due panels of perſons able and ſufficient, and not ſuſpected, or procured, as is appointed by the ſtatutes of this realm; I have not bought, purchaſed, or taken to farm, or contracted for, nor have I promiſed, or given any conſideration, nor will I buy, purchaſe or take to farm, or contract for, promiſe, or give any conſideration whatever, by myſelf or any other perſon for me, or for my uſe, directly or indirectly, to any perſon or perſons whatſoever, for the office of under ſheriff of the county of ———, which I am now to enter upon and enjoy, nor for the profits of the ſame, or for any bailiwick thereof, or any other place or office belonging thereunto; I have not ſold nor contracted for, or let to farm, nor have I granted or

promiſed, for reward or benefit, by myſelf or any other perſon for me, or for my uſe, directly or indirectly, any bailiwick thereof, or any other place or office belonging thereunto; I will truly and diligently execute the good laws and ſtatutes of this realm, and in all things well and truly behave myſelf in my ſaid office, for his Majeſty's advantage, and for the good of his ſubjects, and diſcharge my whole duty to the beſt of my ſkill and power.

So help me God.

He muſt alſo receive the ſacrament, take the oaths of allegiance, ſupremacy, and abjuration, and ſubſcribe the declaration againſt tranſubſtantiation, the forms whereof have been given in pages 2 and 3. Nor by ſtat. 27 *Eliz.* can any under ſheriff act in his official capacity before he hath taken the aforeſaid oaths, on forfeiture of 40 *l.* to be divided between the crown and the proſecutor, which may be ſued for by action of *debt*, *bill*, *plaint*, or *information*, in any of the courts of record at *Weſtminſter*, or before the juſtices of *aſſize* and the *peace*, in their open ſeſſions.

The under ſheriff, on his nomination to the office, muſt enter into the following bond to the high ſheriff, at which time the high ſheriff confirms his appointment, by executing jointly with him indentures of covenants relating to the execution of the ſaid office.

*Form of the bond from an under ſheriff to an high ſheriff.*

*Bond.*

*T. C.* to *W. W.* Penalty 5000 *l.*

*Condition.*

WHEREAS our Sovereign Lord *George* the Third, by the Grace of God *&c.* by his letters patent, bearing date (*the date of ſheriff's patent*) did nominate, make, and appoint, the above-named *W. W.* high ſheriff of the county of *S.* which ſaid *W. W.* afterwards by his indenture, bearing date (*the date of the indenture of covenants*) did depute, aſſign, conſtitute, and ordain, the above-bounden *T. C.* his under ſheriff of the ſaid county of *S.* as in and by the ſaid indenture doth more fully and at large appear. NOW THE CONDITION of this obligation is ſuch, that if the above-bounden *T. C.* his heirs, executors, and adminiſtrators, and every of them, do at all time and times hereafter ſave and keep harmleſs and indemnified, as well the ſaid *W. W.* his heirs, executors, adminſtrators, and aſſigns; as alſo the lands, tenements, hereditaments, goods and chattels of the ſaid *W. W.* for, touching, and concerning, the returns and executions of all ſuch proceſs, writs, and warrants, of what nature ſoever they be, as are or ſhall be directed to the ſheriff of the ſaid county of *S.* and ſhall be brought and delivered or offered to be delivered to the ſaid *T. C.* during the time that the ſaid *W. W.* ſhall be ſheriff of the ſaid county, and of and from all

all iſſues, fines, and amerciaments, which ſhall happen to be impoſed or taxed upon the ſaid *W. W.* for and concerning the not executing, wrongful executing, or detaining in his hands any writs, proceſs, or warrants, and of, for and concerning all eſcapes of all and every perſon or perſons who ſhall be arreſted or apprehended, by virtue of any ſuch proceſs, writ, or warrant, during the time that the ſaid *W. W.* ſhall continue ſheriff of the ſaid county of *S.* AND ALSO if the ſaid *T. C.* his heirs, executors, and adminiſtrators, ſhall ſave harmleſs and indemnified, the ſaid *W. W.* his heirs and aſſigns, and their and each of their lands, goods and chattels, of all ſuch account and accounts as the ſaid *W. W.* is or ſhall be charged with, as ſheriff of the ſaid county of *S.* to our Sovereign Lord the King, his heirs or ſucceſſors, in any of his Majeſty's courts, and of all ſums of money which ſhall be levied or received by the ſaid *T. C.* as under ſheriff of the ſaid *W. W.* or by any bailiff or other perſon, by the direction or aſſent of the ſaid *T. C.* to the uſe of our Sovereign Lord the King, his heirs or ſucceſſors, that then this obligation to be void, or elſe to remain in full force and virtue.

*The indenture between the high ſheriff and under ſheriff.*

THIS indenture made the ——— day of ——— in the ——— year of the reign of our Sovereign Lord *George* the Third, by the Grace of God of *Great Britain*, *France* and *Ireland*, King, Defender of the Faith, and ſo forth, and in the year of our Lord 17—, between *W. W.* of *&c.* Eſq; of the one part, and *T. C.* of *&c.* gentleman, of the other part, WITNESSETH, That he the ſaid *W. W.* being appointed, and having on the day of the date hereof taken the office of ſheriff of the county of *S.* for the whole year, commencing from the day of the date hereof; in conſideration of the aſſured hope and truſt which he the ſaid *W. W.* hath, that he the ſaid *T. C.* will take care that the office of under ſheriff be honeſtly, uprightly, duly, and ſufficiently diſcharged within the ſaid county of *S.* and that the ſaid ſheriff ſhall be freed and diſcharged from all charges and damages whatſoever relating to the ſaid office, and for the conſiderations hereafter in theſe preſents mentioned, he the ſaid *W. W.* hath been pleaſed and contented to depute, ordain, conſtitute, and make the ſaid *T. C.* his under ſheriff of the ſaid county of *S.* for the ſame time and term, and ſo long as he ſhall continue in the ſaid office; but nevertheleſs, ſubject to the proviſo or power herein after-mentioned of diſplacing or removing the ſaid *T. C.* from the ſaid office of under ſheriff, as herein after is mentioned. And the ſaid *W. W.* the more effectually to empower the ſaid *T. C.* to execute the ſaid office of under ſheriff of the ſaid county of *S.* *hath*, (as much as in him lieth, and he lawfully may) authorized, conſtituted, deputed, and appointed, and *doth* authorize, conſtitute, depute, and appoint him the ſaid *T. C.* and all and every ſuch clerk and clerks as he the ſaid *T. C.* ſhall employ or appoint in the ſaid office of under ſheriff, by writing, under the hand and ſeal of the ſaid *T. C.* in the name of him the ſaid *W. W.* as ſheriff of the ſaid county of *S.* upon the requeſt of any plaintiff or plaintiffs

to ſign, ſeal, execute, and as his act and deed deliver; and every aſſignment and aſſignments of any bail-bond and bail-bonds, that ſhall or may, at any time or times hereafter, during his ſheriffalty, be taken in his name as ſheriff of the ſaid county of *S.* from any defendant or defendants, by virtue of any writ, precept or precepts, or mandate whatſoever, which ſhall be directed to him for the execution thereof; *and alſo* for ſuch deputy or deputies to take any inquiſitions requiſite on all proceſs requiring the ſame, and as ſhall be directed to the ſheriff of the county of *S.* during the ſheriffalty of the ſaid *W. W.* in conſideration whereof, and for other good cauſes and conſiderations, him thereunto moving, he the ſaid *T. C.* for himſelf and for his heirs, executors, and adminiſtrators, *doth*, covenant, promiſe, and grant to, and with the ſaid *W. W.* his executors and adminiſtrators, by theſe preſents, in manner following, (that is to ſay) That he the ſaid *T. C.* ſhall well and truly, honeſtly, and ſufficiently, for and during the ſaid term and time, and ſo long as the ſaid *W. W.* ſhall continue in the ſaid office of ſheriff of the ſaid county of *S.* execute and duly perform the ſame, carefully, well, truly and honeſtly demean and behave himſelf therein, and ſhall, during the ſaid time and term, well, truly, honeſtly, and ſufficiently, execute, or cauſe and procure to be executed, all and every writ and writs, proceſs and proceſſes, warrant and warrants, precept and precepts, mandate and mandates, directed, or to be directed from our ſovereign Lord the King, his heirs or ſucceſſors, and from and out of all and every or any of his Majeſty's courts at *Weſtminſter*, or any other courts elſewhere, or otherwiſe, or from any commiſſioner or commiſſioners, juſtice or juſtices of the peace, or other perſon or perſons, officer or officers, which have or ſhall have authority thereunto, to the ſaid ſheriff of the ſaid county of *S.* which during the ſaid time or term ſhall be or ordered to be executed; and of the ſame and every of them, in all due, fit, and convenient time, ſhall make true and ſufficient returns at the ſeveral days, times, and places, according as the ſaid *W. W.* by the ſaid writs, proceſſes, warrants, precepts and mandates, or any of them, is or ſhall be required, limited, or appointed to return the ſame; and ſhall alſo by and during the ſaid time and term, and at all times afterwards, ſave, keep harmleſs, and indemnified, the ſaid *W. W.* his heirs, executors, and adminiſtrators, and his and their goods, chattels, lands, tenements, hereditaments, and eſtate, and every part and parcel thereof, of and from all manner of action and actions, cauſe and cauſes of actions, ſuits, fines, amerciaments, pains, ſum and ſums of money, penalties, contempts, forfeitures, judgments, executions, damages, coſts, and loſſes, and of and from all and every other troubles, charges, and incumbrances whatſoever, that ſhall or may happen, ariſe, grow, be put unto, or ſhall be aſſeſſed, impoſed, ſet, or taxed upon or againſt the ſaid *W. W.* as the ſheriff of *S.* at any time or times, for or by reaſon of the executing, not executing, returning, not returning, or miſreturning, or the not due returning or executing of any of the ſaid writ or writs, proceſs or proceſſes, mandate or mandates, precept or precepts, warrant or warrants, without any trouble, coſts, charges, damages, or expences, therefore to be ſuſtained, incurred, or expended,

pended, by the ſaid *W. W.* or his executors, or adminiſtrators, in, about, for, touching, or concerning the ſame; *and* ſhall alſo from time to time, and at all times hereafter, give notice unto the ſaid *W. W.* of all and every writ or writs that ſhall be ſued or brought againſt him that ſhall come to the ſaid *T. C.* or his deputies, clerks or ſervants; or whereof the ſaid *T. C.* ſhall have notice, and ſhall not appear, or cauſe any appearance to be made or entered, or any common bail to be filed upon any writ or action that ſhall be brought againſt the ſaid *W. W.* without the privity or allowance of him the ſaid *W. W. and further*, that the ſaid *T. C.* or his deputy or deputies, clerk or clerks, or any other perſon or perſons for or under him in the name of the ſaid *W. W.* ſhall not, at any time or times hereafter, during the ſaid term or terms, make, or cauſe to be made, any return or returns, of or to any writ or writs, proceſs or proceſſes, precept or precepts, warrant or warrants, mandate or mandates, whatſoever, touching, or in any wiſe concerning, the liberties or franchiſes of the ſaid county of *S.* in the name of the ſaid *W. W* as ſheriff of the ſaid county of *S.* without timely acquainting the ſaid *W. W.* therewith, and taking and purſuing his juſt and lawful directions therein; if he, upon or after ſuch notice, in due time, give ſuch directions therein; *and alſo*, that he the ſaid *T. C.* his executors or adminiſtrators, ſhall and will, at all times hereafter, acquit and diſcharge, or otherwiſe well and ſufficiently ſave, keep harmleſs and indemnified the ſaid *W. W.* his heirs, executors, and adminiſtrators, and his and their goods and chattles, lands, tenements, and eſtates, of and from all and every ſuits, charges, loſſes, payments, damages, fines, amerciaments, and hindrances whatſoever, that ſhall or may, at any time or times, during the ſaid time he ſhall continue in the ſaid office, or at any time then after ariſe, happen, grow, or come unto, or be brought againſt him the ſaid *W. W.* his heirs, executors, or adminiſtrators, or his or their goods, chattels, lands or tenements, for or by reaſon of any reſcue or reſcues, eſcape or eſcapes, or letting any priſoner or priſoners, voluntarily, or negligently, or otherwiſe, to go at large or eſcape, or for not taking ſufficient bond or bonds, with ſufficient and good ſecurity; or for perſons arreſted or to be arreſted; or of or for priſoners bailable; or of refuſing to accept of bond or bonds, in ſuch manner as by law is or ſhall, during the ſheriffalty of the ſaid *W. W.* be required of any perſon or perſons arreſted, or to be arreſted for any matters or cauſes, for which he, ſhe, or they, ſhall or ſhould be bailed by law; or for the making, or making amiſs, or not due making of all or any aſſignment, of all or any bail-bond or bail-bonds; or for not putting any warrant or warrants of attorney in any of the courts of record at *Weſtminſter*, or elſewhere; or for or by reaſon of any negligence, miſfeazance or miſ-feazances, non-feazance or non-feazances, abuſes, miſdemeanors, commiſſion or commiſſions, omiſſion or omiſſions, default, delay, or contempt; or for or by reaſon of any other matter, cauſe, or thing, that ſhould or ought, at any time, in any kind whatſoever, to be done or performed by the ſaid *T. C.* as under ſheriff of the ſaid county of *S.* or by his deputy or deputies, clerk or clerks, bailiff or bailiffs, ſervant or ſervants, or by reaſon of his or their, or any

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of their not-doing, insufficient doing, over-doing, or neglecting, his or their duty or duties; or for or in respect of any matter, cause, or thing whatsoever, hereafter to be done, or omitted to be done, by him, them, or any of them, concerning the said office: *and moreover*, that he the said *T. C.* shall from time to time, and at all times, when thereunto required, as soon as conveniently may be, during the said time and term, and until the said *W. W.* shall be duly discharged from the said office of sheriff, deliver, or cause to be delivered, unto the said *W. W.* a true account or inventory, in writing, of all extents, and judicial writs or process whatsoever, that shall come to the hands of the said *T. C.* his agent or agents, clerk or clerks, deputy or deputies, or any person or persons appointed to act for, by, or under him, them, or any of them, to be executed with the *teste* and return of the same, and the sums of money therein specified, and the name or names of the person or persons, against whom such writ or writs, process or processes, shall be issued; and the person or persons for whom all and every, or any such writ or writs, process or processes, shall be issued, and what is done upon all and every, or any such writ or writs, process or processes; *and* that he the said *T. C.* shall and will, within the space of ten days next after any levy or receipt by him or any of his deputies, shall be made of any sum or sums of money, upon or by virtue of such extents or judicial writs, process or processes, if thereunto required, pay, or cause to be paid, the sum or sums of money so levied or made to the said *W. W.* or to such person or persons as he shall from time to time nominate and appoint to receive the same; he the said *W. W.* giving a note or receipt in writing under his hand, testifying the receipt of all such sum or sums of money as shall be by him so received: *and* that it shall be in the power of the said *W. W.* notwithstanding any thing in these presents contained, upon complaint to him made of the miscarriage of any bailiff, within the said county of *S.* in the duty of his place, to put out, discharge and displace any such bailiff from his further employment as bailiff, for so much of the said time as shall be then to come: *and likewise*, that the said *T. C.* shall and will, from time to time, and at all times hereafter, give due notice to the said *W. W.* of all such personal attendances as shall from time to time be required, or requisite to be made by the said *W. W.* in the county of *S.* as sheriff of the said county, and be attending upon and assisting to the said sheriff, wherein such personal attendance shall be required, and that he the said *T. C.* shall be aiding and assisting in the raising and levying such force of men, horses, and arms, within the said county of *S.* as the said *W. W.* shall be enjoined to raise and levy; and shall from time to time, and at all times, as occasion shall be and require, give his personal attendance on the said *W. W.* for his doing, performing, and executing of all such thing and things as shall be requisite on his behalf: *and further*, that the said *T. C.* shall, during the said term and time, well, truly, and faithfully, do, execute and perform all and every act and acts, matter and matters, thing and things whatsoever, incident or belonging to the said office of under sheriff of the said county of *S.* and to the utmost and best of his means, skill and power, shall and will well and truly levy, collect, and gather all and sigular such sum and sums of money as do in any wise concern

concern or belong to the ſaid ſheriffalty, or ſheriff of the ſaid county of *S.* and alſo all poſt-fines *pro licentia concordandi*, forfeitures, profits, ſeizures, fee-farm rents, pipe ſilver, exchequer ſilver, extracts of all goods of traitors, felonious perſons, outlaws, and all and every ſuch ſum and ſums of money, forfeitures, entries, and demands whatſoever, as ſhall be at any time or times extracted, charged, or impoſed for the uſe of our Sovereign Lord the King, his heirs and ſucceſſors, or for or by reaſon of any extracts of writs, proceſs of green wax, or otherwiſe, directed out of the court of Exchequer, or Crown Office, or any of the courts of record at *Weſtminſter*, or elſewhere, and commanded, directed, or appointed to be levied or gathered by the ſaid ſheriff of the ſaid county of *S.* and of the ſame, and every of them, and every part thereof, ſhall in due time, from time to time, make a true and juſt account, and due ſatisfaction and payment thereof, to the uſe of our Sovereign Lord the King, his heirs and ſucceſſors, into the receipt of the Exchequer, by tally or tallies, in due form, or into ſuch other courts as the caſe ſhall require; *and alſo* ſhall take of the Pell Office a *conſtat* of every ſuch payment and tally ſtruck; and ſhall likewiſe take out and obtain all other acquittances, meet and neceſſary for the manifeſtation of any ſuch payment as the caſe ſhall require, and all and every ſuch *conſtats* and acquittances ſhall and will from time to time deliver to the ſaid *W. W.* within ſix days after every or any ſuch payment made, if thereunto required; *and* ſhall alſo from time to time from thenceforth keep harmleſs and indemnified the ſaid *W. W.* his heirs, executors, and adminiſtrators, and his and their goods, chattels, lands, tenements and eſtate, from and againſt our ſaid Sovereign Lord the King, his heirs and ſucceſſors, in reſpect of all and every ſum and ſums of money to be had, levied, or received by the ſaid *T. C.* for the uſe of our Sovereign Lord the King, his heirs or ſucceſſors, or which ought to be had, levied, or received by him the ſaid *T. C.* as under ſheriff, or by the ſaid *W. W.* as ſheriff of the ſaid county of *S.* to and for the uſe of our ſaid Sovereign Lord the King, his heirs or ſucceſſors: *and moreover*, that the ſaid *T. C.* his executors, adminiſtrators, or aſſigns, ſhall and will, at his and their own proper coſts and charges, in and by all things join with his deputy for the time being, and with all other clerks appointed or to be appointed by the ſaid *W. W.* ſheriff of the county of *S.* for the ſupplying the ſaid office of under ſheriff of the county of *S.* with proper clerks, for the orderly and duly proceeding for the paſſing the accounts for the ſaid county of *S.* into one account, agreeable to the ſtatute or ſtatutes in that caſe made and provided, touching ſheriffs accounts; *and* ſhall and will, without delay, proceed in the ſaid accounts, with the auditor or auditors aſſigned to take the ſaid accounts, as alſo in paſſing thereof, into one by the like agreement and conſent, and alſo in the declarations thereof before the barons of the ſaid court of Exchequer, and before any other perſon or perſons to be thereunto authorized, and being ready for the declaration thereof, ſhall alſo, at the like proper coſts and charges of the ſaid *T. C.* procure the ſaid auditor and auditors

ditors to attend ſome or one of the barons to take the ſaid declaration, and to make the uſual allowances of the ſaid accounts of the ſaid county of *S.* and the duplicate thereof, to the end that one part thereof, which ſhall be the charge remaining with our Sovereign Lord the King, and the Lord Treaſurer, and Commiſſioners of the Treaſury, and Remembrancer of the Exchequer, may be anſwered with the other part and duplicate thereof, ſubſcribed by ſome of the officers of the Exchequer for the ſaid ſheriff; all which ſhall be ſolicited and followed, to be got, and ſhall be got, finiſhed, and effectually perfected, by the ſaid *T. C.* at his own proper coſts and charges, and in all offices and places through which the ſame ought duly to paſs; and that the ſame ſhall be performed and done with due ſpeed, and without delay and unneceſſary intermiſſion, and ſhall be done and brought to the Pipe Office in that due time and manner which the ſtatute hath ordained concerning ſheriffs accounts, as by the ſtatute or ſtatutes in that behalf is limited and appointed; and likewiſe be diſpatched from the Pipe Office with convenient expedition; and on or before the ——— day of ———, which ſhall be in the year of our Lord 17—, procure ſufficient diſcharge, and formal *quietus eſt*, in due form of law, at the proper coſts and charges of the ſaid *T. C.* for ſo much of the ſaid account as ſhall concern the ſaid *W. W.* as ſheriff of the county of *S.* as aforeſaid, his heirs, executors, or adminiſtrators, and every of them; ſo that his and their lands, tenements, goods, chattels, and eſtate, may at all times hereafter ſtand free and clear of and from all damages, charges, and accounts, for or by reaſon of the ſaid office or place of ſheriff of the ſaid county of *S.* *and further*, that the ſaid *T. C.* at his own proper coſts and charges, ſhall defray, bear, pay, and lay out all ſuch charges of what nature ſoever, as have been heretofore laid out by any under ſheriff of the ſaid county of *S.* at the aſſizes held at —— within the ſaid county; *and* ſhall alſo, at his own proper coſts and charges, defray, bear, and lay forth all charges whatſoever, which are or ſhall be expended at the ſeveral aſſizes held in and for the ſaid county of *S.* at any time or times during the ſaid time or term, for which the ſaid *W. W.* ſhall continue to be ſheriff of the ſaid county of *S.* *and* ſhall and will freely diſcharge and ſave harmleſs the ſaid *W. W.* his heirs, executors, and adminiſtrators, of and from the ſame: *and further*, that the ſaid *T. C.* ſhall at his own proper coſts and charges, defray, bear, pay, and lay forth all charges and other expences whatſoever, that are or ought to be laid forth or diſburſed, in, for, or about the executing or puniſhing all and every traitors and felons, and all other perſons whatſoever, that are or ſhall be condemned or attainted of treaſon, felony, and perſons adjudged to be whipt, ſet upon the pillory, or otherwiſe puniſhed according to law, whereſoever or howſoever in the ſaid county of *S.* and of ſuch priſoners as ſhall be from time to time convicted and attainted, ſhall and will make, or cauſe to be made, due execution according to the judgment or ſentence againſt each and every of them to be pronounced, at any time or times, during the ſaid term or time: *and alſo*, that the ſaid *T. C.* his deputy or deputies, clerk or clerks, bailiff or bailiffs, or any other officer or officers that

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ſhall be employed, retained, admitted, appointed, or permitted by or under him the ſaid *T. C.* at any time or times, during the ſaid term or time, ſhall not, without the ſpecial conſent of the ſaid *W. W.* in that behalf obtained in writing under his hand, detain or keep above the ſpace of forty-eight hours, in their or any of their cuſtody, houſe, room, or chamber, or in any other houſe, room, chamber, or place whatſoever, any priſoner or priſoners, by him, her, or them, or any of them arreſted, or to be arreſted, or taken within the ſaid county of *S.* for any debt, damages, fine, ſuit, or cauſe, for above the value of 20 *l.* of lawful money of *Great Britain*, or for ſeveral or any cauſe or cauſes together, exceeding the ſaid ſum of 20 *l.* but the ſaid priſoners, and every of them ſo arreſted and taken, for above the ſaid ſum of 20 *l.* ſhall forthwith, and without delay, commit, or cauſe to be committed, to the county gaol or priſon, or ſome other common gaol or priſon, appointed or to be appointed for ſuch purpoſe, for the ſaid county of *S.* there to remain until ſuch priſoner or priſoners ſhall be diſcharged by due courſe of law, or ſhall otherwiſe be let to bail, all upon good and ſufficient ſecurities and bail, according to the form of the ſtatute in that caſe made, if ſo be the law ſhall require and warrant the ſaid ſheriff, or the under-ſheriff of the ſaid county of *S.* to let to bail any ſuch priſoner or priſoners, and not otherwiſe; and that he the ſaid *T. C.* ſhall and will well, truly, faithfully, providently, circumſpectly, and diligently, do, perform, execute and accompliſh all and ſingular acts, matters, and things which to the ſaid office of ſheriff or under-ſheriff of the ſaid county of *S.* during the ſaid term and time that he the ſaid *W. W.* ſhall continue in the ſaid office, do or ſhall appertain and belong, or ought to be by the ſaid ſheriff or under-ſheriff performed and accompliſhed; *and alſo*, that the ſaid *T. C.* and all and every of the bailiffs, clerks, ſervants, and miniſters, that ſhall be employed by or under him in the execution of the ſaid office, to the utmoſt of his power, and as much as in him is or ſhall be, all and ſingular the liberties and franchiſes to the ſaid county of *S.* and to the ſaid *W. W.* ſheriff of the ſaid county of *S.* belonging or appertaining, ſhall and will well and truly obſerve, perform, maintain and keep, in all places within the ſaid county of *S.* and ſhall not, ſo far as in the power of the ſaid *T. C.* ſhall lie, permit, or ſuffer the ſaid liberties and franchiſes, or any of them, to be broken, infringed, or violated in anywiſe: *and further*, that he the ſaid *T. C.* ſhall and will duly and juſtly perform, execute and keep all ſuch articles and matters whatſoever, as are contained, mentioned, and expreſſed in the condition of the bond or recognizance, which the ſaid *W. W.* with ſureties, hath or ſhall enter into and acknowledge to the uſe of our ſovereign Lord the King, in his Majeſty's court of exchequer, concerning the ſaid office of ſheriff of the county of *S.* ſave only ſuch as do neceſſarily require the perſonal attendance of the ſaid *W. W.* and the ſaid *W. W.* doth covenant, promiſe and grant, by theſe preſents, for himſelf, his heirs, executors, and adminiſtrators, to and with the ſaid *T. C.* his executors and adminiſtrators, that all and every the covenant and covenants, and obligations, taken or to be

taken, in the name of the ſaid *W. W.* as ſheriff of the ſaid county of *S.* either of or from the ſeveral bailiffs in their places, or of or from any perſon or perſons arreſted, or to be arreſted, within the ſaid county of *S.* within the time that he ſhall continue in the ſaid office, by virtue of any writ, precept or mandate whatſoever, ſo nevertheleſs as the ſaid *W. W.* his heirs, executors, and adminiſtrators, ſhall be ſecured, kept harmleſs, and indemnified by the ſaid *T. C.* his heirs, executors and adminiſtrators, for, touching or concerning the ſaid office of ſheriff, ſhall be to the only uſe of the ſaid *T. C.* his executors and adminiſtrators, for his better ſecurity, and being ſaved harmleſs of and from any damages, loſſes, troubles, and expences, that ſhall or may grow, come, or happen to him, by reaſon of the miſdemeanors or negligences of any of the ſaid bailiffs, or any other perſon or perſons arreſted, or to be arreſted, or for or by reaſon of his or their non-appearances or otherwiſe howſoever: *and* that he the ſaid *T. C.* his ſaid executors and adminiſtrators, performing the covenants herein contained on his part to be performed, ſhall and may, at his own proper coſts and charges, ſue the ſaid covenants and obligations in the name of him the ſaid. *W. W.* by virtue of theſe preſents, and receive, take, and enjoy, to the proper uſe and behoof of the ſaid *T. C.* his executors, adminiſtrators and aſſigns, all ſuch lawful benefits and recompences as ſhall ariſe or come, upon or by reaſon of the ſaid covenants, obligations, and ſuits, and every or any of them, in any manner of wiſe as he the ſaid *W. W.* his executors or adminiſtrators might lawfully and equitably have done if theſe preſents had not been made: *provided nevertheleſs*, and ſo that the ſaid *T. C.* his executors, adminiſtrators and aſſigns, do always indemnify and ſave harmleſs the ſaid *W. W.* his heirs, executors and adminiſtrators, and their, and each of their goods, chattels, lands, tenements, and eſtates, of and from all and all manner of coſts, charges, damages, and ſums of money whatſoever, which may in any wiſe be awarded, adjudged, ordered, decreed, or recovered againſt the ſaid *W. W.* his heirs, executors or adminiſtrators, by reaſon, means, or occaſion of the putting in ſuit as aforeſaid, any of the aforeſaid covenants or obligations by the ſaid under-ſheriff, his executors, adminiſtrators or aſſigns, in the name of the ſaid *W. W.* his executors or adminiſtrators, which he the ſaid *T. C.* doth hereby for himſelf, his executors and adminiſtrators covenant to do; *and alſo*, that it ſhall and may be lawful to and for the ſaid *T. C.* he obſerving and performing the ſaid covenants and agreements herein contained on his part to be performed, to have and enjoy the ſaid office of under-ſheriff of the ſaid county of *S.* ſubject to the proviſo herein after-mentioned, and to keep all and ſingular courts, tourns, leets and county courts, for the ſaid time, at the times and places duly appointed for the ſame, according to the laws and ſtatutes of this realm, and the cuſtoms and uſages of the county of *S.* *and* that in ſuch caſes as aforeſaid he the ſaid *W. W.* as far as he lawfully may, without any breach or infringement of his duty as ſheriff of the ſaid county of *S.* doth covenant, promiſe and grant, that the ſaid *T. C.* ſhall and may have and take all lawful fees, dues, profits, and commodities, that

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ſhall or may be lawfully had, gotten, received, or become due to the ſaid ſheriff, by virtue or means of the ſaid office of ſheriff of the ſaid county of *S.* to the proper uſe of him the ſaid *T. C.* without the contradiction or denial of the ſaid *W. W.* his executors or adminiſtrators, and without any account thereof to be given to the ſaid *W. W. and alſo*, that he the ſaid *T. C.* ſhall and may have, receive and take to and for his own proper uſe (in caſe he the ſaid *T. C.* ſhall be continued in the ſaid office of under-ſheriff of the ſaid county of *S.* during the ſheriffalty of the ſaid *W. W.* and ſhall duly paſs the accounts of the ſaid *W. W.* as ſheriff of the ſaid county, and procure a good and ſufficient diſcharge to him in reſpect thereof, according to the true intent of the covenant herein before in that behalf contained) the ſum of being the allowance for paſſing the accounts of the ſheriff of the county of *S.* made or given to the ſheriff of the ſaid county of *S.* for the time being, by an act of parliament made in the third year of the reign of his late majeſty king *George* the firſt, entitled, An act for the better enabling ſheriffs to ſue out their patents, and paſs their accounts; *and* the ſaid *W. W.* doth hereby nominate, conſtitute and appoint the ſaid *T. C.* his lawful attorney for him and in his name, but to the uſe aforeſaid, to receive from the receipt of his majeſty's exchequer, or from ſuch perſon or perſons as ſhall be appointed to pay the ſame, the ſaid ſum of and on receipt thereof, to make, execute and give for him, and in his name, a full and ſufficient diſcharge and receipt for the ſame; he the ſaid *W. W.* his executors and adminiſtrators, and their and each of their goods, chattels, lands and tenements, being ſaved harmleſs and indemnified from time to time by the ſaid *T. C.* according to the true intent and meaning of theſe preſents: *and whereas*, it is intended by theſe preſents, that the ſaid *T. C.* ſhall receive and account for, in the name of the ſaid *W. W.* as ſheriff of *S.* ſuch of his majeſty's revenue ariſing within the ſaid county of *S.* and during the continuance of him the ſaid *T. C.* in the ſaid office of under-ſheriff, as uſually hath been received by other under-ſheriffs; *and alſo*, that the ſaid *T. C.* ſhall, and he doth hereby accordingly agree to lay out and diſburſe for his majeſty's ſervice ſuch monies as heretofore have uſually been paid, laid out and diſburſed by former under-ſherffs of the ſaid county, whereby the balance of the account between our Lord the King and the ſaid *W. W.* (if any ſhould be due from our ſaid Lord the King to the ſaid *W. W.* as ſheriff of the ſaid county) will of right belong to him the ſaid *T. C.* wherefore to enable him the ſaid *T. C.* to receive the balance of the ſaid account, if any ſhall appear to be due to the ſaid *W. W.* as ſheriff of the ſaid county, he the ſaid *W. W.* doth hereby nominate, conſtitute and appoint him the ſaid *T. C.* his lawful attorney for him the ſaid *W. W.* and in his name, but to the uſes aforeſaid to receive at the receipt of his majeſties exchequer, from ſuch perſon or perſons who ſhall be appointed to pay the ſame, ſuch ſurplus or balance of the ſaid account (if ſuch ſhall be due), and on receipt thereof, to make, execute and give, in the name of him the ſaid *W. W.* a full and ſufficient diſcharge for the ſame. *Provided nevertheleſs*, and it is hereby declared and agreed by and between

all the ſaid parties to theſe preſents, and particularly by the ſaid *T. C.* for himſelf, his heirs, executors and adminiſtrators, that he the ſaid *T. C.* himſelf, his heirs, executors and adminiſtrators, ſhall and will well and truly account for, pay, and deliver to the ſaid *W. W.* his executors or adminiſtrators, all ſuch ſum and ſums of money, fees, dues, perquiſites, profits, and emoluments whatſoever, which have been heretofore uſually had or received by former ſheriffs of the ſaid county of *S.* and not by the under-ſheriff for the time being; any thing herein before contained to the contrary thereof in any wiſe notwithſtanding. And the ſaid *T. C.* for himſelf, his heirs, executors and adminiſtrators, doth hereby covenant, promiſe, grant and agree, to and with the ſaid *W. W.* his executors and adminiſtrators, that he the ſaid *T. C.* his heirs, executors and adminiſtrators, ſhall and will, from time to time, and at all times from henceforth, ſave, keep harmleſs and indemnified him the ſaid *W. W.* his heirs, executors and adminiſtrators, of and from all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, troubles, fines, amerciaments, pains, penalties, forfeitures, defaults, and all damages, matters and things whatſoever, relating to the ſaid office of ſheriff of *S.* excepting only what ſhall happen by the perſonal default, negligence or omiſſion of him the ſaid *W. W.* or by or thro' his proper acts. *Provided nevertheleſs*, that it ſhall and may be lawful to and for the ſaid *W. W.* during his continuing the ſaid *T. C.* in the ſaid office of under-ſheriff, at his will and pleaſure to command the ſaid *T. C.* or his deputy or deputies, clerk or clerks, to attend him the ſaid *W. W.* with the freeholders books, wherein the freeholders names of the county of *S.* are or ſhall be inſerted and entered, and that the ſaid *W. W.* at his will and pleaſure, ſhall from time to time nominate and return ſuch juror and jurors, inqueſt and inqueſts, to be returned and impanelled as jurors to inquire and ſerve in any of his majeſty's court or courts at *Weſtminſter*, or before any of his majeſty's court or courts, commiſſioner or commiſſioners of *oyer* and *terminer*, gaol-delivery, commiſſion of the peace, juſtice or juſtices of the peace, and all and every other perſon and perſons, having lawful authority to command the ſaid *W. W.* as ſheriff of the ſaid county, to cauſe to come before them, or any of them, any juror or jurors, inqueſt or inqueſts whatſoever, to ſerve for or in the ſaid county, or upon any iſſue whatſoever ariſing to be tried, or any inquiſition to be taken within the ſaid county of *S.* *And* the ſaid *T. C.* for himſelf, his heirs, executors and adminiſtrators, doth covenant and promiſe to and with the ſaid *W. W.* his executors and adminiſtrators by theſe preſents, that he the ſaid *T. C.* ſhall and will from time to time ingroſs, impanel, and return, or cauſe to be ingroſſed, impanelled, and returned, and ſummoned, ſuch juror or jurors, inqueſt and inqueſts, ſo from time to time nominated and appointed to be returned by the ſaid *W. W.* with his name ſubſcribed to ſuch returns, and none other, together with the like proceſs to them directed in that behalf, and ſhall and will always, on notice, attend with the ſaid freeholders book on him the ſaid *W. W.* and permit and ſuffer him to nominate and return ſuch juror and jurors, inqueſt and inqueſts, in manner aforeſaid; any thing in theſe preſents contained

to the contrary thereof notwithstanding. *And further*, that he the said *T. C.* or his deputies, clerks or servants, shall not at any time or times, during the said time or term which the said *W. W.* shall continue to be sheriff of the said county of *S.* ingross, return, impanel, or cause to be ingrossed, returned, or impanelled, any inquest or jury for the trying any traitor or traitors, without the approbation of the said *W. W.* first had and obtained; *nor* open, execute, or return any letters or commandments from the King's majesty, the privy council, or the secretaries of state, directed to the sheriff of *S.* without first giving notice to the said *W. W.* and taking his directions therein, in case he, at the time of the receipt or delivery of any of the said letters or commandments, shall be resident in the said county of *S.* *Provided further*, that it shall and may be lawful to and for the said *W. W.* at any time or times, during his continuing the said *T. C.* in the said office of under-sheriff, at his will and pleasure to prohibit and forbid the said *T. C.* his deputy or deputies, clerk or clerks, by a note in writing under his hand, from opening, sending, executing or returning any writ or writs, precept, or mandate, that shall be directed to the sheriff of *S.* for the electing any member or members to serve in parliament in or for the said county of *S.* to the end the said *W. W.* may personally and duly open, send, execute, and return the same; *and* in such case the said *T. C.* for himself, his heirs, executors and administrators, *doth* hereby covenant and promise to and with the said *W. W.* his executors and administrators, that he the said *T. C.* will not open, send, execute, or return any such writ or writs, precept, or mandate, without the special directions of the said *W. W.* first had and obtained in writing, whereby to hinder or prevent the said *W. W.* from opening, sending, returning, or executing any such writ or writs in his proper person: *Provided always*, and it is the true intent, meaning, and agreement of all the said parties to these presents, that if the said *T. C.* shall not well, honestly and carefully demean and behave himself in the said office of under-sheriff of the said county of *S.* in all business, matters, and things thereunto belonging, to the good liking and approbation of the said *W. W.* that then and from thenceforth it shall and may be lawful to and for the said *W. W.* at any time or times during his continuance in the said office of sheriff of the said county of *S.* to displace and remove the said *T. C.* so misbehaving, out of and from the said place and office of under-sheriff aforesaid, for and during all the then residue of the said time and term hereby granted; any thing in this present indenture contained, or any other matter whatsoever to the contrary thereof in any wise notwithstanding. *And* the said *T. C.* for himself, his heirs, executors and administrators, *doth* covenant, promise and agree, to and with the said *W. W.* his executors and administrators by these presents, that in case of such displacing the said *T. C.* as aforesaid, he the said *T. C.* his executors and administrators, after his being so displaced, shall not nor will act as under-sheriff of the said county in any wise howsoever during the sheriffalty of the said *W. W.* and in case of such removal as aforesaid, he the said *T. C.* shall and will deliver unto the said *W. W.* his executors or administrators, all and all

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manner of books belonging or relating to the ſaid office, and all bail-bonds, proceſs, and mandates, and other things whatſoever relating to the ſaid office which ſhall then be depending or remaining, or be in the hands, cuſtody, or diſpoſal of the ſaid *T. C.* his clerks, bailiffs or ſervants, unexecuted, or not returned, whole, ſafe and uncancelled, and ſhall and will alſo pay and deliver to him the ſaid *W. W.* all ſum and ſums of money, goods, and chattels, as ſhall be taken, paid, or levied in execution, or for the uſe of the King's majeſty, his heirs or ſucceſſors, by virtue of the ſaid office of ſheriff or under-ſheriff of the ſaid county of *S.* within two days next after requeſt in ſuch behalf ſhall be made by him the ſaid *W. W.* his heirs, executors and adminiſtrators. *And laſtly*, he the ſaid *T. C.* for himſelf, his heirs, executors, and adminiſtrators, *doth* hereby covenant, promiſe and grant to and with the ſaid *W. W.* his executors and adminiſtrators by theſe preſents, that he the ſaid *T. C.* ſhall and will bear, pay, and diſcharge all rewards or ſums of money payable or to be paid by the ſaid ſheriff of *S.* by virtue of any act or acts of parliament already made, or which at any time or times hereafter, during the ſaid *T. C.'s* continuance in the ſaid office, ſhall be made for apprehending or convicting any perſon or perſons for any felony or robbery committed, or to be committed, on the King's highway, or for any burglary or felonious breaking or entering any houſes, or for counterfeiting, clipping, or diminiſhing the coin of this kingdom, or for any other matter or thing that already is or ſhall be hereafter, for the time and term of his continuing in the ſaid office of under-ſheriff, by any act or acts of parliament impoſed on the ſaid ſheriff of *S.* and indemnify the ſaid *W. W.* his heirs, executors and adminiſtrators, of and from the ſame. *In witneſs etc.*

The under-ſheriff having executed and interchanged with the high-ſheriff the foregoing indenture of covenants, proceeds to the execution of his office by appointing proper clerks under him for the diſpatch of the different departments of his duty: Thoſe clerks hold their office by indenture of appointment from the under-ſheriff, in the following form:

### *The Under-Sheriff's indenture of appointment of his Clerk.*

THIS INDENTURE made, *&c.* between *T. C.* of *&c.* gentleman, under-ſheriff to *W. W.* ſheriff of the county of *S.* of the one part; and *S. R.* gentleman, of the other part *&c. Whereas* the ſaid ſheriff hath admitted the ſaid *T. C.* into the office of his under-ſheriff, ſo that the guidance and management of the ſaid office, and all matters and things thereto relating or belonging, ſhall be and are to be and continue ſubject to and under the order, direction, and power of him the ſaid *T. C.* and by his order and direction, and not otherwiſe, to be performed and done during all the ſaid ſheriffalty, he the ſaid *T. C.* having given ſecurity for his the ſaid *T. C.'s* faithful diſcharge of the ſaid office, and indemnifying the ſaid ſheriff: *Now this indenture witneſſeth*, that the ſaid *T. C.* at the ſpecial inſtance and requeſt of the ſaid *S. R.* hath appointed and taken, and by theſe preſents doth

appoint

appoint and take the ſaid *S. R.* to be clerk of the ſaid ſheriff, and of him the ſaid *T. C.* in the ſaid office, to act, do, and perform all and every act and acts, thing and things neceſſary and convenient for executing the ſaid office of under-ſheriff of the ſaid county of *S.* and which other clerks of the ſaid office have uſually and heretofore done and performed, during all the time and continuance of the ſaid ſheriff, with liberty for him the ſaid *S. R.* to take to his own uſe all lawful and uſual clerks fees: *In conſideration* whereof the ſaid *S. R.* for himſelf, his heirs, executors, and adminiſtrators, *doth* covenant, promiſe, and agree, to and with the ſaid *T. C.* his executors and adminiſtrators, by theſe preſents, in manner following; (that is to ſay) That he the *S. R.* ſhall and will, during all the ſheriffalty aforeſaid, well and honeſtly demean and behave himſelf in the ſaid office, and diligently and carefully ſerve and attend him the ſaid *T. C.* in and about the diſpatch of the ſaid buſineſs in the ſaid office, and obſerve and perform all his lawful orders and directions thereon, and uſe and beſtow his utmoſt care, diligence, and attendance therein: *And alſo* that he the ſaid *S. R.* ſhall not make out any warrant upon any writ of *Habere facias poſſeſſionem*, without receiving or agreeing for the fees due for the execution thereof, or without the direction or conſent of him the ſaid *T. C.* *And alſo* that he the ſaid *S. R.* ſhall not make out any warrant whatſoever, to any other perſons than ſuch as are bailiffs of liberties, or ſheriffs bailiffs, who have given ſecurity to the ſatisfaction of him the ſaid *T. C.* *and alſo* that he the ſaid *S. R.* ſhall not make out any warrant or warrants, on any writ or writs of execution againſt the body, goods, or chattels of any perſon or perſons, for or on behalf of whom any writ or writs of privilege *De non moleſtando*, *ſuperſedeas*, or *protection* ſhall be allowed in the ſaid office of the ſaid ſheriff; *and alſo* that he the ſaid *S. R.* ſhall make out all other lawful and ſufficient warrants upon any proceſs that ſhall come to his hands, and be required of him; *and alſo* that he the ſaid *S. R.* ſhall not accept or take any *Capias ad ſatisfaciendum* againſt any bailiff, to charge them in cuſtody of the ſaid ſheriff, or any meſne proceſs requiring bail for more than 20 *l.* without the direction of the ſaid *T. C.* but rather if the party applying will not ſtay for ſuch directions, to give the party applying a warrant thereon; *and alſo* that he the ſaid *S. R.* ſhall take good and ſufficient bonds and ſecurity of and from all perſons he ſhall let to bail, or to or for whom he ſhall make or grant any warrants of replevin, ſo that the ſheriff may be indemnified; *and alſo* that he the ſaid *S. R.* ſhall not take any inquiſition upon any writ of *Ad quod damnum*, nor any extent, elegit, or ſpecial *Capias utlegatum*, where any houſes, lands, or tenements are to be found; *and alſo* that he the ſaid *S. R.* ſhall not return any writ of *Habeas corpus* for any perſon in cuſtody, or fined in any criminal matter, or on the King's proceſs, nor ſhall he diſcharge the body or goods of any ſuch perſon, againſt the directions of him the ſaid *T. C.* *and alſo* that he the ſaid *S. R.* ſhall not return any writs of *Venire facias*, *Diſtringas*, or precept, with any other panel than what the ſaid *T. C.* ſhall approve of, or impanel any grand jury, or jury of life and death, or any other inqueſt or jury whatſoever, without the conſent of the

ſaid

ſaid *T. C. and alſo* that he the ſaid *S. R.* ſhall not return above 20 *l.* iſſues on any writ of *Diſtringas* without a rule of court, or the ſaid *T. C.*'s orders for ſo doing, or return *Devaſtavit* till after an inquiſition taken; *and alſo* that he the ſaid *S. R.* ſhall make legal and ſufficient returns in due time, to the beſt of his power, of and upon all other writs and proceſs to be returned by him, and that he the ſaid *S. R.* ſhall within ten days next after every term, during the ſaid ſheriffalty, or when and as often as he ſhall be by the ſaid *T. C.* required, give unto the ſaid *T. C.* his executors or adminiſtrators, a juſt, true, and perfect account of all ſuch monies and fees which he ſhall have received for the ſaid ſheriff and under-ſheriff, and pay the ſame to the ſaid *T. C.* his executors or adminiſtrators; and the ſaid *S. R.* ſhall in his own proper perſon carefully and diligently attend all and every court and courts of juſtice, judges, juſtices, or commiſſioners, when and as often as he ſhall be thereunto required by the ſaid *T. C.* and ſhall then and there perform all ſuch matters and things as ſhall be requiſite on the behalf of the ſaid ſheriff; *and* that the ſaid *S. R.* ſhall during the time aforeſaid, and after ſuch time as the ſaid ſheriff ſhall go out of his office, at the requeſt of the ſaid *T. C.* aſſiſt the ſaid *T. C.* in the management of any affair relating to the ſaid office, as alſo in returning any writ or writs, or in the paſſing the accounts of the ſaid ſheriff, and doing all matters and things that ſhall be requiſite in order to the diſcharging and indemnifying the ſaid ſheriff, and procuring a *quietus*, and that without fee or reward for ſo doing; *and laſtly* the ſaid *S. R.* for himſelf, his heirs, executors, and adminiſtrators, doth further covenant, promiſe, and agree to and with the ſaid *T. C.* his executors and adminiſtrators, in manner following; that is to ſay, that he the ſaid *S. R.* ſhall and will from time to time, and at all times hereafter, at his own proper coſts and charges, well and ſufficiently ſave, defend, keep harmleſs and indemnified the ſaid *W. W.* and *T. C.* and each and every of them, their and each and every of their goods and chattels, lands, and tenements, and their and each and every of their executors and adminiſtrators, of and from all and all manner of action and actions, cauſe and cauſes of action, ſuits, troubles, fines, amerciaments, pains, penalties, ſum and ſums, contempts, forfeitures, judgments, executions, coſts, recoveries, loſſes, damages, and expences whatſoever, and of and from all and every other trouble, charge, and incumbrance whatſoever, that ſhall or may at any time or times hereafter happen to ariſe, grow, or be ſued forth, proſecuted, recovered, aſſeſſed, impoſed, ſet, or taxed upon or againſt the ſaid *W. W.* and *T. C.* or any and either of them, or which they or any or either of them ſhall or may, at any time or times hereafter happen to ſuſtain, incur, or be put unto, for or by reaſon or means of any act, default, neglect, omiſſion, commiſſion, or miſtake of him the ſaid *S. R.* in any matter, cauſe, or thing whatſoever relating to the ſaid office. *Provided always*, that if the ſaid *S. R.* ſhall not obſerve, perform, and keep the covenants and agreements herein above ſpecified, and behave himſelf to the good liking of him the ſaid *T. C.* it ſhall and may be lawful for him the ſaid *T. C.* to remove and put out the ſaid *S. R.* from being a clerk in the ſaid office;

office; and in case of such removal he the said *S. R.* shall immediately deliver up all books, writings and papers relating to the said office, necessary for the carrying on the business of the same, to the said *T. C.* and all other books, papers, and writings which the said *S. R.* shall demand, being in the custody or power of the said *J. B.* or with which the said *S. R.* hath been intrusted; the said *T. C.* giving the said *S. R.* a receipt or discharge for the same. In witness *&c.*

Sealed *&c.*

By stat. 42 *Edw* 3. *cap.* 9. *confirmed* by 23 *Hen.* 6. *cap.* 7. no under sheriff is to abide in his office above one year.

By stat. 3 *Geo. cap.* 15. if a high sheriff dies before the expiration of his year, or before he is superseded, the under sheriff is to continue in his office, and execute the same in the name of the deceased sheriff, till another is legally appointed, and to be answerable for all matters done during the interval, as the high sheriff would have been; and his sureties given to the high sheriff on his entering on his office shall stand and be answerable to the King, and all persons whatsoever for the due performance of his duty of office during such interval.

By stat. 1 *Hen.* 5. *cap.* 4. the *under sheriff*, *sheriff's clerk*, *receiver*, or *bailiff*, shall not practise as an attorney in any of the King's courts during the time that he holds such office.

An under sheriff may assign a prisoner as well as the high sheriff, and the same is valid in law. 4 *Bac. Abr.* 441. 446. *Barnes's Notes* 259.

An under sheriff is *ex officio* included in several acts of parliament; and where a statute appoints any matter to be done by the sheriff, and prescribes no particular manner for executing the same, so as to make the same personal as to the high sheriff, it may be done by the under sheriff; but where by the statute it appears to be a personal act, there it can be done only by the high sheriff.

All the common and ordinary business of the *high sheriff* is by the indenture between him and the *under sheriff* transferred to such *under sheriff*.

The under sheriff must always have a deputy attendant in each of the *courts at Westminster*, to receive and execute the commands of such court, and to render an account of such businesses that may happen touching the sheriff and his office. He must likewise file a warrant of attorney for his high sheriff in each of the *courts at Westminster* by an attorney of such court, otherwise the high sheriff is liable to an action on the statute for such neglect of his under sheriff.

By stat. 5 *Ann*, no sheriff of *London* or *Middlesex* shall take any fee or reward for the place of under sheriff, nor subject such under sheriff to any expences relating to his office usually borne by the high sheriff.

By stat. 3 *Geo. cap.* 15. no person shall buy, sell, or take to farm, the office of *under sheriff*, or *deputy sheriff*, *seal keeper*, *county clerk*, *shire clerk*, *gaoler*, *bailiff*, or any of the said offices, on forfeiture of 500 *l.* one moiety to go to the King, the other moiety to such person as

ſhall ſue for the ſame, within two years after the offence committed, in any of the *courts at Weſtminſter*.

*The duty of the under ſheriff* is to execute all matters and things directed to the high ſheriff from the King, or from the *courts at Weſtminſter*, or elſewhere, having power ſo to do. *Vide* the indenture of covenants between him and the high ſheriff, page 11.

## *How ſheriffs are to be paid and ſatisfied for their trouble in executing proceſs.*

AT *common law* it is expreſsly held, that no officer whoſe office relates to the adminiſtration of juſtice ſhould take any reward for doing his duty, but what he was to receive from the King. 2 *Bac. Abr.* 463. 10 *Mod.* 139.

By ſtat. 3 *Edw. cap.* 26. this maxim is confirmed; for the ſtatute ſays, no ſheriff ſhall take any reward to do his office, but ſhall be paid out of that he takes for the King; and if he doth, he ſhall yield thrice as much, and ſhall be puniſhed at the King's pleaſure.

By ſtat. 29 *Eliz. cap.* 4. no ſheriff, under ſheriff, bailiff of liberties, their officers, ſervants *&c.* ſhall take for ſerving any *extent* or *execution* on the body, land, or goods, of any perſons, more than is here appointed, *viz.* twelvepence for every twenty ſhillings where the ſum is not above one hundred pounds, and ſixpence for every twenty ſhillings above one hundred pounds that he ſhall levy and deliver in execution, or take the body in execution for, on pain that every ſheriff *&c.* who ſhall act contrary ſhall forfeit to the party aggrieved *treble* damages, and forfeit forty pounds; one moiety to the Queen, and the other moiety to the party ſuing for the ſame.

This act not to extend to any fees to be taken for any execution within any city or town corporate. *Same ſtat.*

It is held that a ſheriff, by the *equity* of ſtat. 26 *Hen.* 6. *cap.* 10. ſhall take fourpence for every warrant. *Vide Winch.* 21.

By ſtat. 3 *Geo. cap.* 15. when any ſheriff ſhall by proceſs out of the *Exchequer* extend any goods *&c.* into the hands of his Majeſty *&c.* for any debts due to the crown, and ſhall die, or be ſuperſeded before a *venditioni exponas* be awarded for ſale, or before he has made actual ſale thereof, and a writ ſhall afterwards be awarded to a ſubſequent ſheriff, who ſhall make ſale of ſuch goods *&c.* the *barons* of the *Exchequer*, if ſitting or not, they, or any of them, of the degree of the *coif*, ſhall ſettle the fees or poundage for ſuch ſeizure and ſale between ſuch preceding and ſubſequent ſheriff, with regard to the trouble each ſheriff had in the execution of ſuch proceſs.

No ſheriff, under ſheriff, bailiff, or other perſon employed in levying any debts *&c.* due to the crown by proceſs, out of the *Exchequer*, ſhall take any fee on pretence of ſuch levying *&c.* except fourpence for an acquittance, which ſuch officer is to give to the perſon on whom ſuch debt *&c.* is levied, and the bailiff *&c.* receiving ſuch debt *&c.* ſhall account for the ſame to the ſheriff, and may require an acquittance from ſuch ſheriff without fee, from which debts the ſheriff

riff ſhall diſcharge the debtor, by telling and anſwering the ſame on their accounts in the *Exchequer*; and if any ſheriff &c. ſhall *nihil* or not duly anſwer to the crown any debts ſo levied, he ſhall forfeit treble damages to the party aggrieved, and double the ſum which ſhall be decreed to ſuch party by the court of *Exchequer*, on complaint and proof of ſuch abuſe before the *barons*, in ſuch ſummary way as to them ſhall ſeem meet; and if any ſheriff &c. ſhall demand any money from any perſon from whom any debt is payable to the crown by proceſs out of the *Exchequer*, on pretence of executing the proceſs, or in reſpect of fees due for collecting the ſame, or if any one of the officers aforeſaid ſhall demand any ſum for forbearance to levy any ſuch debts written out to them by the ſaid proceſs, every ſuch offender ſhall be adjudged guilty of extortion, injuſtice, and oppreſſion; and being thereof convicted, ſhall forfeit treble damages, and coſts to the party aggrieved, and double the ſum extorted to be decreed by the *barons* on complaint, and proof in a ſummary way, provided ſuch conviction be within two years after the offence.

Nothing in this act ſhall deprive any ſheriff of ſuch poundage or allowance as is given by this act, or of ſuch poundage or reward as may be given them by warrant from the *Treaſury*, chancellor of the *Exchequer*, or *barons*, for any extraordinary ſervice done the crown.

All ſheriffs who ſhall levy any debts &c. except *poſt fines* due to his Majeſty by proceſs on ſummons of the *pipe* or *green wax*, by *levari facias* out of the *Exchequer*, ſhall have an allowance on their accounts of twelvepence out of every twenty ſhillings for any ſum not exceeding 100*l.* and ſixpence for every twenty ſhillings above the firſt hundred pounds, and for all debts &c. except *poſt fines* due to his Majeſty by proceſs and *fieri facias*, and extent iſſuing out of the *Exchequer*, one ſhilling and ſixpence out of every twenty ſhillings for any ſum not exceeding one hundred pounds, and twelvepence for every twenty ſhillings over and above the firſt hundred pounds, provided ſuch ſheriff ſhall anſwer the ſame on his account by the general ſealing day of ſuch term in which he ought to be diſmiſſed the court, or in ſuch time to which he ſhall have a day granted to finiſh his accounts, by the *Chief Baron*, or one of the *barons* of the *Coif*, and not otherwiſe.

By ſtat. 3 & 8 *Geo. cap.* 25. no ſheriffs or their bailiffs, or bailiff of any liberty by virtue of his office, or by reaſon of their executing any writ of *habeas facias poſſeſſionem*, or *ſeiſina*, to *receive* or *take* any greater fee than twelvepence for every twenty ſhillings of the yearly value of lands &c. whereof poſſeſſion or ſeizen ſhall be given where the whole exceeds not the yearly value of one hundred pounds, and ſixpence for every twenty ſhillings *per annum* above the yearly value of one hundred pounds.

By ſtat. 3 *Geo. c.* 15. ſheriffs &c. ſhall in no caſe take poundage on executing any writ of *capias ad ſatisfaciendum*, or on charging any perſon in execution by virtue of ſuch writ for any greater ſum than the real debt amounts to, which ſum the plaintiff is to mark on the back of the writ before it be delivered to the ſheriff, and if any ſheriff &c. ſhall take greater fees, ſuch offender ſhall be adjudged guilty of extortion, injuſtice, and oppreſſion, and being convicted, ſhall forfeit to

the party aggrieved treble damages, and double the ſum extorted, to be decreed by the court out of which ſuch writ iſſued, on complaint, and proof of ſuch extortion before the court in ſuch ſummary way as to them ſhall ſeem meet; and every perſon ſo offending ſhall forfeit two hundred pounds, one moiety to the King, and the other to ſuch as ſhall ſue in any *court at Weſtminſter*, provided ſuch ſuit be commenced within two years after the offence.

By ſtat. 23 *Hen.* 6. *cap.* 10. if the ſheriff *&c.* ſhall take any money or other reward for omitting any arreſt or attachment to be made, it is extortion, and the ſheriff *&c.* ſo offending ſhall forfeit for every ſuch offence ten pounds, half to the King, and half to the informer.

The ſheriffs fees for executing the different duties of his office on *proceſs &c.* may be aſcertained by the following table.

## TABLE *of Fees in* London *and* Middleſex.

| | Sheriff | | | Clerk | | | Total | | |
|---|---|---|---|---|---|---|---|---|---|
| | *l.* | *s.* | *d.* | *l.* | *s.* | *d.* | *l.* | *s.* | *d.* |
| To the charge of paſſing the ſheriff's accounts for *Middleſex* in the *Exchequer*, by ſtat. 3. *Geo.* 2. | 119 | 3 | 0 | | | | | | |
| Of every bailiff, when admitted into his office, in lieu of all fees due to the ſheriff on arreſts that may come to his hands, except fees on executions, (commonly called *poundage.*) | 6 | 10 | 0 | | | | | | |
| Of every bailiff for his indenture of covenants, and bond to perform the ſame, and attending the execution thereof. | | | | 1 | 1 | 6 | | | |
| For every warrant on a bill of *Middleſex*, *capias*, or *quo minus*. | 0 | 0 | 4 | 0 | 2 | 0 | 0 | 2 | 4 |
| For every name more than one. | | | | 0 | 0 | 4 | | | |
| For every warrant on a ſpecial *capias*, or *quo minus*, i. e. containing the whole declaration. | 0 | 0 | 4 | 0 | 2 | 0 | 0 | 2 | 4 |
| For every warrant on a writ of *Scire facias*, extent, *elegit*, ſummons againſt privileged perſons, original in real or perſonal actions, *pone*, *ven' facias* out of the *Exchequer*, attachment for the peace out of the Crown Office, *diſtringas*, writ of poſſeſſion, *capias excommunicatum*, *ne exeat regno*, *ſupplicavit*, and *ſi laicus*. | | | | 0 | 2 | 4 | | | |
| For every bail bond taken in the office, (which rarely happens, the bond | | | | | | | | | |

being

| | Sheriff | | | Clerk | | | Total | | |
|---|---|---|---|---|---|---|---|---|---|
| | *l.* | *s.* | *d.* | *l.* | *s.* | *d.* | *l.* | *s.* | *d.* |
| being usually taken from defendants in custody by the bailiff) for searching the office, and making a *supersedeas* to set the defendant at liberty | | | | | 0 | 9 4 | | | |
| For taking security on a writ of *ne exeat regno*, searching the office, and *supersedeas* to set the defendant at liberty | | | | | 1 | 1 0 | | | |
| For a bond on an attachment *for the peace* out of the Crown Office | | | | | 0 | 2 4 | | | |
| For taking security on a writ of *supplicavit*, which rarely happens, searching the office, and for a *supersedeas* to set the defendant at liberty | | | | | 0 | 10 6 | | | |
| For the assignment of every bail-bond | 0 | 2 | 4 | | | | | | |
| For the plaintiff's discharge for the same | 0 | 2 | 4 | | | | | | |
| | | | | | 0 | 5 0 | | | |
| For the return of the writ | 0 | 0 | 4 | | | | | | |
| For the delivery up of a bail-bond to the defendant, by the plaintiff's order | | | | | 0 | 5 0 | | | |
| *Fees for returns of writs.* | | | | | | | | | |
| For allowing every writ of *habeas corpus cum causa.* | 0 | 4 | 8 | | | | | | |
| For the return thereof, if but one writ to be returned against defendant | 0 | 2 | 4 | | | | | | |
| | | | | 0 | 7 | 4 | 0 | 9 | 4 |
| For a warrant to the bailiff to conduct the defendant before the judge, or court, as the writ is returned | 0 | 2 | 4 | | | | | | |
| | 0 | 2 | 0 | | | | | | |
| For every other writ against the defendant returned thereon | 0 | 2 | 0 | 0 | 2 | 4 | 0 | 2 | 4 |
| If the defendant is in gaol, then for a warrant to the keeper to deliver the defendant to the bailiff | | | | | 0 | 2 4 | | | |
| For executing a writ of enquiry of damages, and return of the inquisition thereon | 0 | 10 | 0 | 0 | 3 | 4 | | | |
| To the bailiff, for summoning and swearing the jury | 0 | 4 | 0 | | | | | | |
| For the use of the court-house, or room where the writ is executed | 0 | 1 | 0 | | | | | | |

To

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l. s. d.* | *l. s. d.* | *l. s. d.* |
| To the jurors, each 1*s.* 0 12 0 | | | |
| 0 18 0 | | | 1 10 4 |
| For ſwearing each witneſs — — | | 0 0 4 | |
| For taking an inquiſition on a *capias utlegatum*, ſchedule of the goods ſeiſed and return thereof | | 0 18 6 | |
| To the bailiff for ſummoning the jury 0 4 0 | | | |
| To the uſe of the room, where the inquiſition is taken 0 1 0 | | | 1 15 6 |
| To the jurymen, each 1*s.* 0 12 0 | | | |
| 0 17 0 | | | |
| If more than one finding, for every other | | 0 3 4 | |
| The like on extents — — | | 0 18 6 | |
| Attending each adjournment — — | | 0 10 0 | |
| For every ſummons for a witneſs to give evidence | | 0 2 0 | |
| For taking an inquiſition on a *ſcire fieri*, inquiry, inquiſition, and return thereof | 0 10 0 | 0 8 6 | 0 18 6 |
| For the return of a *cepi corpus*, or *non invent.* on every bill of *Middleſex*, *capias quo minus*, *capias ad ſatisfaciendum*, and *capias utlegatum*, if no inquiſition taken | | 0 0 4 | |
| For the like return, if by a bailiff of a liberty | | 0 0 8 | |
| Return of *Iſtud breve* | | 0 0 4 | |
| For returning *fieri feci* on a *fieri facias* | | 0 2 0 | |
| If by the bailiff of a liberty | | 0 4 0 | |
| For returning *nulla bona* thereon | | 0 1 0 | |
| If by the bailiff of a liberty | | 0 2 0 | |
| For ſpecial returns, ſuch as *reſcue*, defendant diſcharged by *ſuperſedeas*, or committed to the *Fleet*, or *King's Bench* priſon, on a writ of *habeas corpus* | | 0 2 4 | |
| For the return of *venditioni exponas* | | 0 2 0 | |
| For the return of *ſcire feci*, each name | | 0 2 0 | |
| For the return of *nihil*, or *mortuus*, on a *ſcire facias* | | 0 1 0 | |

For

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l. s. d.* | *l. s. d.* | *l. s. d.* |
| For the return of an eſcape warrant | | 0 2 0 | |
| For the return of a *venire facias*, ſummons againſt privileged perſons, or original, whereby the defendant is ſummoned | | 0 2 0 | |
| For the return of a *nihil* thereon | | 0 1 0 | |
| For the return of *non invent.* on an attachment out of the courts of *Chancery*, *Exchequer*, or dutchy of *Lancaſter* | | 0 1 0 | |
| For the return of a *cepi corpus* thereon | | 0 2 0 | |
| For the return of *non invent.* on a proclamation out of the courts of *Chancery*, *Exchequer*, or dutchy of *Lancaſter* | | 0 2 0 | |
| For the allowance of every writ of *ſuperſedeas*, or reſtitution. | 0 2 0 | 0 0 4 | 0 2 4 |
| For a warrant thereon to diſcharge the defendant's body or goods out of cuſtody | | 0 2 4 | |
| For the return of a writ of *venire facias juratores*, with the panel of 48 freeholders names thereto annexed | | 0 2 0 | |
| For the return of a writ of *diſtringas*, or *habeas corpora*, with a panel of 48 freeholders names annexed thereto | | 0 12 0 | |

*N. B.* The ſheriff of *Middl'* makes up a panel of 48 jurymen, for each court in *Weſtminſter Hall*, every term; but before he can do that, by his officer, he enquires after a competent number of perſons names, taken out of the freeholders book for that purpoſe, makes out a warrant to his bailiff to ſummon them, delivers a panel to the marſhal of each chief juſtice, or chief baron, attends the court by himſelf or deputy during each ſeſſions of *niſi prius*, and after term enters the names of each juryman in an alphabetical regiſter, and gives certificates to each juryman of his attendance, (if required); for all which no fee is claimed or taken.

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l. s. d.* | *l. s. d.* | *l. s. d.* |
| For the return of a writ of poſſeſſion | | 0 2 0 | |
| Attending the maſter of the *King's Bench* office, prothonotary of the court of *Common Pleas*, or deputy-remembrancer of the court of *Exchequer*, from the plaintiff and defendant, each one guinea | 2 2 0 | | |

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l.* *s.* *d.* | *l.* *s.* *d.* | *l.* *s.* *d.* |
| For attending with the jury on a view, and certifying to the court that the view has been had, the ſame fee as is paid to each juryman | | | |
| For attending every trial at bar, or at *niſi prius*, where a ſpecial jury is ſummoned, the ſame fee as is given to each juryman after the trial | | | |
| *N. B.* The laſt mentioned fee is taken by the under-ſheriff, or clerk, who attends the trial. | | | |
| For every warrant to a bailiff to ſummon a ſpecial jury | | 0 2 4 | |
| *Fees called Poundage.* | | | |
| For taking a defendant in execution, or levying the goods, for every ſum of money not exceeding 100 *l.* for every 20 *s.* thereof | 0 1 0 | | |
| For every 20 *s.* exceeding that ſum | 0 0 6 | | |
| For the like on an extent, *fieri facias*, or *capias ad ſatisfaciendum*, at the ſuit of the King | 0 1 6 | | |
| For every 20 *s.* after the firſt 100 *l.* | 0 1 0 | | |
| For every 20 *s.* levied on a *levari facias*, the ſummons of the pipe or green wax, (except poſt fines) | 0 1 0 | | |
| For executing every writ of poſſeſſion, for every 20 *s.* of the yearly value of the premiſſes, of which poſſeſſion is given | 0 1 0 | | |
| For the return of the precept to ſummon the jury before the commiſſioners in a commiſſion of idiocy or lunacy, and attending thereon | 2 2 0 | | |
| For the return of a *venire facias jur'*, and attending the trial of a traverſe at the ſeſſions of the peace, on every indictment, except for felony, or where the defendant is in priſon | | 0 10 0 | |

*N. B.* The ſheriff of *M.* ſummons, impanels, and returns 8 grand juries in the year, at the ſeveral ſeſſions of the peace at *Hicks's Hall*, and attends by his deputy during the time of the ſeſſions there; and alſo returns 8 juries in the year at the ſeveral ſeſſions at the *Old Bailey*, beſides party juries, and juries of matrons, and attendants there, without any other fee or reward whatſoever.

For

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l. s. d.* | *l. s. d.* | *l. s. d.* |
| For a bill of ſale of goods on a *fieri facias*, and an inventory thereunto annexed | | 0 9 0 | |
| For a bill of ſale of a term of years | | 0 13 4 | |
| The like on a *venditioni exponas* | | 0 13 4 | |
| For allowing a writ of *non ponend' in aſſiſ'* | | 0 13 4 | |
| For charging a defendant in cuſtody with every other writ than that on which he is arreſted | | 0 2 4 | |
| For a certificate in order for a *ſuperſedeas* | | 0 2 4 | |
| For a certificate that the defendant is in execution, in order for his diſcharge by the late act of parliament | | 0 2 4 | |
| For his diſcharge by the rule of court thereon | Nothing | | |
| For attending with writs and other things out of the office, to be produced on trial, for each day's attendance | | 0 6 8 | |
| For the plaintiff's diſcharge on every writ of *fieri facias*, whereon money has been levied, or on a *capias ad ſatisfaciend'* executed on the defendant, and on every writ on which the defendant is committed to gaol | | 0 2 4 | |
| For ſearching the books and files, and a warrant to the keeper of *Newgate* to diſcharge the defendant out of cuſtody | | 0 2 0 | |

*N. B.* The defendants are oftner diſcharged out of *Newgate* without paying any fees than with.

Copies of writs are given, and ſearches are made for priſoners in *Newgate*, without any fees for the ſame.

| | | | |
|---|---|---|---|
| For every ſearch | | 0 0 4 | |
| For a ſhort copy of a writ, in order to put in bail by | | 0 0 6 | |
| For ſearching for a writ in force, which is never done but upon the | | | |

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l. s. d.* | *l. s. d.* | *l. s. d.* |
| undertaking of some attorney, to put in bail thereto | | 0 1 0 | |
| For a copy of a bill of *Middlesex*, *capias*, or *quo minus*, at length | | 0 1 0 | |
| For copies of all writs, or other things, for every sheet of copy wrote | | 0 0 6 | |
| For executing and returning a writ of false judgment, or *accedas ad cur'* | | 0 6 8 | |

The fees for executing a writ of *ad quod damnum* cannot well be settled, but must be left to the sheriff and the party, to be adjusted between them, because the inquisition on this writ is always taken on the place where the highway to be inclosed lies, or where the intended fair or market is to be held, which may occasion the sheriff's travelling a considerable journey.

The fees for executing a writ of partition cannot well be settled for the same reason; and a provision is made by stat. 8 & 9 *W.* 3. *c.* 31. for settling the same, in case the sheriffs and the parties cannot agree.

| | Sheriff | Clerk | Total |
|---|---|---|---|
| | *l. s. d.* | *l. s. d.* | |
| For attending the lord mayor, as conservator of the river *Thames*; making warrants on the writs of *capias*, and summons, and returning the same, and for summoning, impanelling, and returning the grand jury at the first court in every year, the water-bailiff pays. | | 1 1 0 | |
| For attending the lord mayor at the second court in every year, and returning the summons, and *capias* process, the water bailiff pays | | 0 10 6 | |
| For summoning, impanelling, and returning the traverse jury, and attending the trials there, which very rarely happens | | 0 10 6 | |
| For returning, summoning, and impanelling a jury, and attending commissioners in a commission out of the *Exchequer* to find debts | | 0 10 0 | |
| For the like on a forcible entry, before two justices, which happens but very seldom | | 0 10 0 | |
| For a warrant on a precept for two justices to remove the force after such inquisition taken. | | 0 2 4 | |

# A SCHEDULE of FEES to be paid for paſſing the patents of the ſeveral ſheriffs of *England* and *Wales*, by ſtat. 3*d Geo.*

*The charge taken and received in the court of Chancery on account of ſuing out of the patents of the ſeveral ſheriffs of* England Wales, *that are ſued out there.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| THE King's Duty for Stamps | 0 | 12 | 6 |
| To the Serjeant Trumpeter | 3 | 0 | 0 |
| To the Maſter of the Rolls | 0 | 8 | 8 |
| Signing the docquet | 0 | 4 | 0 |
| Hanaper fee | 0 | 15 | 0 |
| The ſix clerks fee on the patent, writ of aſſiſtance, writ of diſcharge, and *dedimus poteſtatem* | 1 | 7 | 0 |
| For ingroſſing the patent, writ of aſſiſtance, writ of diſcharge, *dedimus poteſtatem*, the three oaths, the docquet parchment, and attending the ſealing the patent | 1 | 14 | 4 |
| The recognizance and duty of a *Welſh* patent, more | 0 | 3 | 6 |

*For paſſing their accounts,*

*To the clerk of the Pipe at the appoſal of ſheriffs.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| CAnterbury | 1 | 13 | 4 |
| Cumberland | 1 | 13 | 4 |
| York | 5 | 0 | 0 |
| Huntingdon | 1 | 6 | 8 |
| London and Middleſex | 2 | 0 | 0 |
| Lincoln | 2 | 13 | 4 |
| Monmouth | 1 | 13 | 4 |
| Northumberland | 1 | 13 | 4 |
| Rutland | 1 | 6 | 8 |
| Weſtmoreland | 1 | 6 | 8 |
| The reſt of the counties of *England*, each | 2 | 0 | 0 |

*To the clerk of the Pipe at caſting out of court, and for the* quietus, *and chancellor's allowance.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| CAnterbury and Huntingdon | 4 | 3 | 4 |
| Cumberland | 2 | 16 | 8 |
| York | 10 | 3 | 4 |
| Kent | 4 | 3 | 4 |
| London and Middleſex | 5 | 6 | 8 |
| Monmouth | 2 | 16 | 8 |

| | l. | s. | d. |
|---|---|---|---|
| Northumberland | 2 | 16 | 8 |
| Rutland | 1 | 16 | 8 |
| Weſtmoreland | 2 | 3 | 4 |
| The reſt of the counties of *England*, each | 3 | 3 | 4 |

*To the clerk of the Pipe for the allowance of juſtices wages in the counties following*, viz.

| | l. | s. | d. |
|---|---|---|---|
| YORK | 1 | 0 | 0 |
| London and Middleſex | 0 | 13 | 0 |
| Lincoln | 0 | 10 | 4 |
| The reſt of the counties in *England*, if any ſuch allowance be made | 0 | 6 | 8 |
| For ſetting of a ſeizure or debt by petition, or judgment of court, when it happens | 0 | 1 | 0 |
| For allowance of a record of ſurpluſage for the firſt five pounds | 0 | 6 | 8 |
| For every other five pounds | 0 | 3 | 4 |

*To the clerk of the Pipe for the ſeveral cities and accounting towns, for their whole account, and* quietus *thereon.*

| | l. | s. | d. |
|---|---|---|---|
| BRiſtol, Glouceſter, York, Newcaſtle — of each | 1 | 10 | 0 |
| Canterbury, Coventry, Exeter, Litchfield, Lincoln, Norwich, Kingſton upon Hull, Nottingham, Pool, Southampton — of each | 1 | 0 | 0 |

*To the ſecondaries, and the ſworn clerks in the ſaid office, at the appoſals of ſheriffs at the coming into their account, and writing their annual books, together with the vicontiels of the foot or charge of their whole account.*

| | l. | s. | d. |
|---|---|---|---|
| BEdford | 0 | 6 | 0 |
| Berks, Bucks — each | 0 | 6 | 0 |
| Canterbury and Huntingdon | 4 | 13 | 4 |

Cornwall

| | l. | s. | d. |
|---|---|---|---|
| Cornwall | 6 | 0 | 0 |
| Cumberland | 3 | 13 | 4 |
| Derby | 5 | 5 | 0 |
| Devon, Dorset } each | 6 | 0 | 0 |
| Eſſex | 10 | 6 | 8 |
| York | 17 | 0 | 0 |
| Glouceſter, Hereford } each | 6 | 0 | 0 |
| Hertford | 5 | 6 | 8 |
| Kent | 6 | 13 | 4 |
| Lincoln | 4 | 13 | 4 |
| Leiceſter | 6 | 13 | 4 |
| London and Middleſex, two Sugar Loaves, and | 4 | 0 | 0 |
| Monmouth | 3 | 0 | 0 |
| Norfolk | 6 | 13 | 4 |
| Northampton | 4 | 10 | 0 |
| Northumberland | 4 | 13 | 4 |
| Nottingham | 5 | 10 | 0 |
| Oxford | 6 | 0 | 0 |
| Rutland | 3 | 6 | 8 |
| Surry, Suſſex } each | 5 | 13 | 4 |
| Shropſhire, Suffolk } each | 6 | 0 | 0 |
| Southampton | 7 | 13 | 4 |
| Stafford | 5 | 13 | 4 |
| Somerſet | 9 | 6 | 8 |
| Weſtmoreland | 2 | 0 | 0 |
| Warwick | 4 | 16 | 8 |
| Worceſter | 6 | 0 | 0 |
| Wilts | 8 | 0 | 0 |

*For caſting out of court, and for the* quietus, *&c.*

| | l. | s. | d. |
|---|---|---|---|
| Bedford | 6 | 0 | 0 |
| Berks | 5 | 6 | 8 |
| Bucks | 5 | 6 | 8 |
| Canterbury and Huntingdon | 4 | 13 | 4 |
| Cornwall | 5 | 13 | 4 |
| Cumberland | 4 | 13 | 4 |
| Derby | 5 | 6 | 8 |
| Devonſhire | 8 | 6 | 8 |
| Dorſet | 6 | 13 | 4 |
| Eſſex | 11 | 0 | 0 |
| York | 23 | 6 | 8 |
| Glouceſter | 7 | 6 | 8 |

Hereford

| | l. | s. | d. |
|---|---|---|---|
| Hereford | 6 | 0 | 0 |
| Hertford | 6 | 13 | 4 |
| Kent | 11 | 13 | 4 |
| Lincoln | 6 | 0 | 0 |
| Leiceſter | 8 | 6 | 8 |
| London and Middleſex, two Sugar Loaves, and | 4 | 0 | 0 |
| Monmouth | 3 | 3 | 0 |
| Northampton, Norfolk } each | 7 | 6 | 8 |
| Nottingham | 6 | 6 | 8 |
| Northumberland | 14 | 13 | 4 |
| Oxford | 8 | 6 | 8 |
| Rutland | 2 | 0 | 0 |
| Stafford | 6 | 13 | 4 |
| Surrey, Suſſex } each | 5 | 16 | 8 |
| Shropſhire | 5 | 6 | 8 |
| Suffolk | 6 | 0 | 0 |
| Southampton | 8 | 6 | 8 |
| Somerſet | 10 | 0 | 0 |
| Weſtmorland | 2 | 8 | 4 |
| Warwick | 5 | 10 | 0 |
| Wigorn' | 7 | 6 | 8 |
| Wilts | 8 | 13 | 4 |

*Fees paid by them for cities and accounting towns.*

| | l: | s. | d. |
|---|---|---|---|
| Briſtol | 3 | 6 | 8 |
| Canterbury | 2 | 13 | 4 |
| York | 5 | 0 | 0 |
| Coventry | 2 | 13 | 4 |
| Exeter | 1 | 10 | 0 |
| Glouceſter | 2 | 13 | 4 |
| Lincoln | 2 | 13 | 4 |
| Litchfield | 1 | 6 | 8 |
| Norwich | 3 | 6 | 8 |
| Wigorn' | 2 | 0 | 0 |
| Kingſton upon Hull | 3 | 6 | 8 |
| Nottingham | 2 | 0 | 0 |
| Newcaſtle | 2 | 13 | 4 |
| Pool | 1 | 10 | 0 |
| Southampton | 2 | 0 | 0 |

Memorandum, *The ſheriffs of the counties palatine of* Cheſter *and* Lancaſter *do not account before the clerk of the Pipe, but before the reſpective auditors of thoſe counties; but their books being written every year, and certificates made (of what they take in charge) to the auditor*

*auditor, the following fees are to be taken by the clerk of the Pipe, and the ſworn clerk for thoſe counties,* (viz.)

| | l. | s. | d. |
|---|---|---|---|
| Cheſter | 2 | 3 | 4 |
| Lancaſter | 4 | 6 | 8 |

*To the firſt ſecondary.*

| | l. | s. | d. |
|---|---|---|---|
| FOR allowing the ſheriff's tallies of profer in each county | 0 | 6 | 8 |
| In each city and town | 0 | 3 | 4 |
| Making up the ſheriff's ſum, containing his whole charge in *York* | 0 | 13 | 4 |
| *London* and *Middleſex* | 0 | 13 | 4 |
| For the reſt of the counties, each | 0 | 6 | 8 |
| Allowing a talley *de remanente comp.* or any other talley *de ſol'* in his account, when ſuch happen | 0 | 1 | 0 |
| For charging a poſt ſcrow, which rarely happens | 0 | 13 | 4 |

*To the ſecond ſecondary.*

| | l. | s. | d. |
|---|---|---|---|
| FOR drawing down a debt received by *diſtringas*, or levied by a writ of *fieri facias* from either of the remembrancers office upon the ſcrow back | 0 | 3 | 4 |
| If an extraordinary length | 0 | 6 | 8 |

*To the petty bag.*

| | l. | s. | d. |
|---|---|---|---|
| FOR ingroſſing the ſcrow of green wax of the ſheriff of the county of *York* | 1 | 0 | 0 |
| *London* and *Middleſex* | 1 | 0 | 0 |
| The reſt of the counties of *England*, each | 0 | 10 | 0 |
| For the accounting towns and cities, each | 0 | 3 | 4 |

*Caſual fees to the ſworn clerks in their reſpective aſſignments,* viz.

| | l. | s. | d. |
|---|---|---|---|
| FOR a *conſtat* of a ſeizure or debt in order to be ruled or diſcharged | 0 | 4 | 4 |
| For ſettling of a ſeizure or debt upon a ſheriff's account, by petition or judgment of court, when it happens | 0 | 3 | 4 |
| Filing the certificates of felons goods, and charging the debts therein contained, each | 0 | 6 | 8 |

*For allowance of juſtices wages.*

| | l. | s. | d. |
|---|---|---|---|
| YORK | 2 | 0 | 0 |
| *London* and *Middleſex* | 2 | 0 | 0 |
| *Lincoln* | 1 | 0 | 0 |
| The reſt of the counties of *England*, each | 0 | 13 | 4 |

*For sheriff's allowances.*

| | l. | s. | d. |
|---|---|---|---|
| YORK | 0 | 13 | 4 |
| *London* and *Middlesex* | 3 | 6 | 8 |
| The rest of the counties, each | 0 | 6 | 8 |
| Record of surplusage for the first five pounds | 0 | 6 | 8 |
| For every other five pounds | 0 | 3 | 4 |

*To the writing clerk for the business of the whole year.*

| | l. | s. | d. |
|---|---|---|---|
| CAnterbury and Huntingdon | 5 | 0 | 0 |
| Cornwall | 6 | 0 | 0 |
| Devonshire | 6 | 0 | 0 |
| York | 15 | 0 | 0 |
| Canterbury | 7 | 0 | 0 |
| Lincoln | 6 | 10 | 0 |
| London and Middlesex | 6 | 0 | 0 |
| Monmouth | 3 | 0 | 0 |
| Rutland | 1 | 0 | 0 |
| Somerset | 7 | 13 | 4 |
| Sussex | 3 | 10 | 0 |
| Westmoreland | 2 | 0 | 0 |
| The rest of the counties, each | 5 | 0 | 0 |
| City of Bristol | 1 | 0 | 0 |
| City of York | 1 | 0 | 0 |
| City of Norwich | 1 | 0 | 0 |
| Kingston upon Hull | 0 | 18 | 0 |
| Newcastle | 0 | 18 | 4 |
| Pool | 0 | 6 | 8 |
| The rest of the cities, each | 0 | 13 | 4 |
| County palatine of Chester | 0 | 6 | 8 |
| County palatine of Lancaster | 0 | 13 | 4 |

To be paid to the bagman of the office at the appoſal of the ſheriffs

| | l. | s. | d. |
|---|---|---|---|
| Of *England*, in each county, two ſhillings and ſixpence, and the caſting out | 0 | 5 | 0 |
| And for each city and accounting town | 0 | 2 | 6 |

*To the comptroller of the Pipe.*

| | l. | s. | d. |
|---|---|---|---|
| FOR appoſal of *London*, *Middleſex*, and *York*, each | 2 | 0 | 0 |
| For appoſal of *Surrey*, *Suſſex*, *Rutland*, and *Weſtmoreland*, each | 0 | 15 | 0 |
| For appoſal of every other county | 1 | 7 | 6 |
| For caſting out of *London*, *Middleſex*, and *York*, each | 2 | 0 | 0 |
| For caſting out of *Surrey*, *Suſſex*, and *Rutland*, each | 0 | 15 | 0 |
| For caſting out of every other county | 1 | 10 | 0 |

For

| | l. | s. | d. |
|---|---|---|---|
| For return of ſummons for *London*, *Middleſex*, and *York*, each - - - | 0 | 5 | 0 |
| For return of every other ſummons - - | 0 | 2 | 6 |
| For petitions, which ſeldom happen - - | 0 | 2 | 6 |

*To the three clerks of the comptroller of the Pipe in paſſing their accounts.*

| | | Appoſals. l. | s. | d. | Caſting out. l. | s. | d. |
|---|---|---|---|---|---|---|---|
| Bedford, Hertford, Northampton | each - | 1 | 2 | 6 | 1 | 0 | 0 |
| Surrey, Rutland | each - | 1 | 5 | 0 | 1 | 5 | 0 |
| London and Middleſex | each - | 1 | 5 | 0 | 3 | 5 | 0 |
| Cambridge, Hereford, Leiceſter, Norfolk, Nottingham, Stafford, Warwick | each - | 1 | 12 | 6 | 1 | 10 | 0 |
| Suſſex - - - | | 1 | 15 | 0 | 1 | 15 | 0 |
| Derby, Oxford | each - | 1 | 19 | 2 | 1 | 16 | 8 |
| Canterbury, Huntingdon, Glouceſter, Kent, Eſſex | each - | 2 | 2 | 6 | 2 | 0 | 9 |
| Bucks, Monmouth, Berks, Suffolk, Southampton, Worceſter | each - | 2 | 9 | 2 | 2 | 6 | 8 |
| Wiltſhire, Shrewſbury, Northumberland | each - | 2 | 9 | 2 | 2 | 6 | 8 |
| Lincoln - - - | | 2 | 9 | 2 | 2 | 6 | 8 |
| Cornwall, Devonſhire, Dorſetſhire, Somerſetſhire | each - | 3 | 9 | 2 | 3 | 6 | 8 |
| York - - - | | 4 | 16 | 8 | 4 | 16 | 8 |
| Weſtmoreland - - | | 0 | 17 | 6 | 0 | 17 | 6 |

For the return of every ſummons, ſeven ſhillings and ſix-pence, except *London* and *Middleſex*, fifteen ſhillings; *York*, one pound and five ſhillings; and *Cornwall*, *Devon*, *Dorſet*, *Lincoln*, *Somerſet*, *Suffolk*, *Southampton*, *Wilts*, and *Shrewſbury*, each ſeventeen ſhillings and ſix-pence. For the petition of allowance, three ſhillings and ſix-pence, except in *London*, *Middleſex* and *York*, thirteen ſhillings and four pence; and in *Cornwall*, *Devon*, and *Somerſet*, ſix ſhillings and eight pence each; for every other petition, one ſhilling; and for the juſtices wages in *London* and *Middleſex*, ten ſhillings.

*In the King's Remembrancer's Office, upon giving ſecurity when he enters into his office.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| THE ſtamp-duty of the recognizance - | 0 | 10 | 0 |
| The caption fee before the baron - | 0 | 8 | 8 |
| The King's Remembrancer's fee for the ſame, for the counties of *York* and *Norfolk*, for each of them | 0 | 13 | 4 |
| To him for every county of *England*, except *Lancaſter* and *Durham*, and the ſeveral counties of *Wales*, which give no ſecurity in the Exchequer | 0 | 10 | 0 |
| To the attorney for making the recognizance, attending the baron, entering and enrolling the recognizance, making the *fiat*, and duty for the ſame, and filing the warrant of attorney - - - | 0 | 18 | 0 |
| On the appoſal of every ſheriff upon the proceſs returnable in *Eaſter* term to the deputy remembrancer - - - - - | 0 | 5 | 0 |
| To the attorney who receives and files the writs, and attends the appoſals of the ſheriffs - | 0 | 4 | 4 |
| The like upon the proceſs returnable in *Michaelmas* term | 0 | 9 | 4 |
| For making the certificate when the ſheriff enters upon his account of what ſeiſures are by him made upon the proceſs returned in that office during the year | 0 | 4 | 4 |

*In the Treaſurer's Remembrancer's Office on paſſing their accounts by the Remembrancer.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| ON a baron's warrant for reſpiting a ſheriff's appoſal, or for a day over to finiſh his accounts | 0 | 4 | 0 |
| On the view of a ſheriff's accounts in *Eaſter* and *Michaelmas* term - - - | 0 | 6 | 8 |
| On the commiſſion to ſwear a ſheriff in the county to account - - - - | 0 | 6 | 8 |
| On examining and ruling a ſheriff's petition of allowance for the two days granted *ex gratia curiæ* for finiſhing his account, and for filing his affidavit of felons goods - - - - | 0 | 12 | 0 |

Upon

| | l. | s. | d. |
|---|---|---|---|
| On examining and ruling any other petition in a sheriff's account, when any such happens - | 0 | 13 | 4 |
| On a record of surplusage for the first five pounds | 0 | 6 | 8 |
| For every other five pounds - - - | 0 | 3 | 4 |
| For filing any *constat*, warrant, or other *exhibit* - | 0 | 1 | 0 |

*To the sworn clerks.*

| | l. | s. | d. |
|---|---|---|---|
| FOR making the view of a sheriff's account in *Easter* and *Michaelmas* term, five shillings each term, *viz.* - - - - | 0 | 10 | 0 |
| For giving a sheriff notice termly, during his year of office, of any information or plaint against him, according to the statute in that case made and provided, and for attending his appofals before the barons, and in *Easter* and *Michaelmas* term, twenty shillings each term, *viz.* - - - - | 2 | 0 | 0 |
| For drawing any warrant to be signed by the chancellor, or a baron of the Exchequer. - | 0 | 6 | 8 |
| For attending a baron for his hand thereto - | 0 | 3 | 4 |
| For directing a sheriff in his business during the three terms he is upon his account, ten shillings each term, *viz.* - - - | 1 | 10 | 0 |
| For making the commission to swear a sheriff in the country to account pursuant to a warrant from a baron for that purpose - - - | 0 | 10 | 0 |
| For the oath thereunto annexed - - | 0 | 6 | 8 |
| For a high sheriff's warrant to be sworn to account, (when he comes in person) and for attending his being sworn - - - - | 1 | 0 | 0 |
| For an under-sheriff's warrant - - | 0 | 3 | 4 |
| For attending and putting in a sheriff's profers at the receipt of Exchequer in *Cro. Cli. Paschæ & Cro. Sci. Mic.* when his year is ended, at his swearing to account - - - - | 1 | 6 | 8 |
| For entering the two days *ex gratia Curiæ* - | 0 | 6 | 8 |
| For drawing a sheriff's oath touching felons goods | 0 | 6 | 8 |
| For a copy thereof to transmit to the Pipe - | 0 | 3 | 4 |
| For a certificate of the execution of a process - | 0 | 6 | 8 |
| For a search in order to make such certificate - | 0 | 3 | 4 |
| For drawing any petition in parchment, and enrolling it | 0 | 6 | 0 |
| For enrolling a sheriff's bill of allowance - | 0 | 13 | 4 |
| For enrolling a schedule *in Onere Constat*, or warrant by the roll - - - | 0 | 6 | 8 |
| For a record or surplusage for the first five pounds - | 0 | 6 | 8 |
| For every other five pounds - - - | 0 | 3 | 4 |
| For copying any seizure made by a sheriff, *per* sheet | 0 | 0 | 8 |
| For examining and signing the same - - | 0 | 3 | 4 |

| | l. | s. | d. |
|---|---|---|---|
| For a writ of assistance and seal - - | 0 | 10 | 0 |
| For attending at *Westminster* to dismiss a sheriff the court, on finishing his acccount - | 0 | 6 | 8 |

*To the filazer.*

| | l. | s. | d. |
|---|---|---|---|
| FOR entering the high-sheriff's commission, or warrant *ad computandum* on the scroll of accountants - - - - | 0 | 5 | 0 |
| For an under-sheriff's warrant, and any warrant *ad recipiend' brevia* - - - | 0 | 2 | 0 |
| For the sheriff's tallies of profers - - | 0 | 2 | 0 |
| For entering a sheriff's writ on the bills - | 0 | 2 | 0 |
| And when he comes *post diem* and amerciaments are set by the court, then for each amerciament one shilling, being usually six during his year, *viz.* | 0 | 6 | 0 |

When any plea, composition, order, or the like, happens during a sheriff's accounts, through his defaults or contempts, he pays the same fees that are paid by other suitors.

*To the under-clerks*, viz.

| | l. | s. | d. |
|---|---|---|---|
| FOR writing a warrant or affidavit - | 0 | 1 | 0 |
| On return of process twice a year, five shillings, *viz.* - - - - | 0 | 10 | 0 |
| For ingrossing a commission, and oath annexed - | 0 | 5 | 0 |

*To the petty bag.*

| | l. | s. | d. |
|---|---|---|---|
| FOR carrying any writ to be sealed - | 0 | 0 | 6 |
| For a commission - - - | 0 | 1 | 0 |
| A sheriff pays him at each of his apposals two shillings, *viz.* - - - - | 0 | 4 | 0 |
| And for postage of all his business, during the time he is upon his account - - - | 0 | 5 | 0 |

*To the first-fruits and tenths in his Majesty's Exchequer.*

| | l. | s. | d. |
|---|---|---|---|
| FOR attending the sheriff's apposals at *Westminster* upon their returning of writs issued for arrears of first-fruits, and for filing the same in *Easter* term, each - - - - | 0 | 4 | 4 |
| The like for *Michaelmas* - - | 0 | 4 | 4 |

*To the foreign apposer, his deputy, or chief clerk, by all sheriffs of counties, cities and towns, at their apposal upon the summons of he green wax, and for making out the justices wages when craved by the sheriff.*

| | Apposal. | | | Justices Wages. | | |
|---|---|---|---|---|---|---|
| | *l.* | *s.* | *d.* | *l.* | *s.* | *d.* |
| Bedford | 3 | 5 | 0 | 1 | 12 | 6 |
| Berks | 3 | 5 | 0 | 1 | 12 | 6 |
| Bucks | 3 | 5 | 0 | 1 | 12 | 6 |
| Cambridge and Huntingdon | 3 | 5 | 0 | 1 | 12 | 6 |
| Cornwall | 6 | 5 | 0 | 1 | 12 | 6 |
| Cumberland | 3 | 5 | 0 | 1 | 12 | 6 |
| Derby | 3 | 18 | 4 | 1 | 12 | 6 |
| Devon | 7 | 5 | 0 | 1 | 12 | 6 |
| Dorset | 4 | 5 | 0 | 1 | 12 | 6 |
| Essex | 6 | 5 | 0 | 1 | 12 | 6 |
| Glouceſter | 4 | 5 | 0 | 1 | 12 | 6 |
| Hereford | 3 | 5 | 0 | 1 | 12 | 6 |
| Hertford | 3 | 18 | 4 | 1 | 12 | 6 |
| Kent | 6 | 5 | 0 | 1 | 12 | 6 |
| Leiceſter | 3 | 5 | 0 | 1 | 12 | 6 |
| Lincoln | 6 | 5 | 0 | 1 | 12 | 6 |
| London and Middleſex | 7 | 10 | 0 | 5 | 10 | 0 |
| Monmouth | 3 | 5 | 0 | 1 | 12 | 6 |
| Norfolk | 6 | 5 | 0 | 3 | 5 | 0 |
| Northampton | 5 | 5 | 0 | 1 | 12 | 6 |
| Nottingham | 3 | 18 | 4 | 1 | 12 | 6 |
| Northumberland | 1 | 15 | 0 | 1 | 12 | 6 |
| Oxford | 3 | 5 | 0 | 1 | 12 | 6 |
| Rutland | 1 | 15 | 0 | 0 | 0 | 0 |
| Salop | 4 | 5 | 0 | 1 | 12 | 6 |
| Somerſet | 6 | 5 | 0 | 1 | 12 | 6 |
| Southampton | 3 | 18 | 4 | 1 | 12 | 6 |
| Stafford | 3 | 5 | 0 | 1 | 2 | 6 |
| Suffolk | 7 | 5 | 0 | 3 | 5 | 0 |
| Surrey | 3 | 5 | 0 | 1 | 12 | 6 |
| Suſſex | 3 | 5 | 0 | 1 | 12 | 6 |
| Warwick | 3 | 5 | 0 | 1 | 12 | 6 |
| Weſtmorland | 1 | 15 | 0 | 0 | 0 | 0 |
| Worceſter | 3 | 5 | 0 | 1 | 12 | 6 |
| Wilts | 5 | 5 | 0 | 1 | 12 | 6 |
| York | 9 | 5 | 4 | 3 | 5 | 0 |

| Cities. | Appoſals. l. | s. | d. |
|---|---|---|---|
| Briſtol | 0 | 17 | 6 |
| Coventry | 0 | 17 | 6 |
| Canterbury | 0 | 17 | 6 |
| Exeter | 1 | 2 | 6 |
| Glouceſter | 0 | 17 | 6 |
| Litchfield | 0 | 15 | 10 |
| Lincoln | 0 | 15 | 10 |
| Norwich | 1 | 12 | 6 |
| Worceſter | 0 | 17 | 6 |
| York | 0 | 17 | 6 |

| Towns. | Appoſals. l. | s. | d. |
|---|---|---|---|
| Kingſton upon Hull | 0 | 15 | 10 |
| Nottingham | 0 | 17 | 6 |
| Newcaſtle upon Tyne | 0 | 17 | 6 |
| Pool | 0 | 14 | 2 |
| Southampton | 0 | 17 | 6 |

*To the clerk of the extracts in his Majeſty's Court of Exchequer, and to the ſworn clerk in that office, by all ſheriffs accountable in the Exchequer upon their appoſals on the ſummons of the green wax.*

| | l. | s. | d. |
|---|---|---|---|
| To the clerk of the extracts for *Northumberland* and *Weſtmoreland*, each | 0 | 10 | 0 |
| Of *London* and *Middleſex* | 1 | 2 | 0 |
| Of the county of *Rutland* | 0 | 13 | 4 |
| Of every other county, each | 1 | 0 | 0 |
| Of the city of *Exon* | 0 | 10 | 0 |
| Of every other city and town, each | 0 | 6 | 8 |

To the ſworn clerk for writing out the ſummons twice every year, and attending the appoſals.

| | l. | s. | d. |
|---|---|---|---|
| Of the county of *Rutland* | 0 | 9 | 2 |
| Of *York* | 1 | 6 | 8 |
| Of *Surrey* | 1 | 13 | 4 |
| Of *Weſtmoreland* | 0 | 16 | 8 |
| Of the counties of *Hereford*, *Hertford*, *Oxford*, *Suffolk* and *Southampton*, each | 1 | 0 | 0 |
| Of every other county | 1 | 6 | 8 |
| Of the cities of *Briſtol*, *Litchfield*, and town of *Pool*, each | 0 | 5 | 10 |
| Of the city of *Exeter* | 0 | 10 | 0 |
| Of every other city and town, each | 0 | 8 | 4 |

The

| | l. | s. | d. |
|---|---|---|---|
| The fee due to the chancellor of the Exchequer, his secretary, and clerk, for passing a sheriff's allowance, to be - - - | 0 | 15 | 0 |

*To the cursitor-baron, and his clerk.*

| | l. | s. | d. |
|---|---|---|---|
| TO the baron for swearing to their account, and signing their warrant - - | 0 | 16 | 8 |
| To his clerk - - - | 0 | 4 | 0 |
| To the baron at their appofals - - | 1 | 0 | 0 |
| To his clerk - - - - | 0 | 7 | 6 |
| To the baron at their casting out of court - - | 1 | 0 | 0 |
| To his clerk - - - - | 0 | 7 | 6 |

The Sheriffs of *London* and *Middlesex*, and the sheriffs of the county of *York*, pay double fees; and the sheriffs of *Sussex*, *Surrey*, *Rutland*, and *Westmorland*, pay half fees.

*To the Marshals of his Majesty's Court of Exchequer, granted ot them by patent under the great seal without salary.*

Easter *Term.*

| | l. | s. | d. |
|---|---|---|---|
| ALL sheriffs of the counties of *England* come then to be appofed on their writs and proces before the barons, and pay the said marshals (except *Rutland* and *Yorkshire*) - - - | 0 | 15 | 10 |
| *Rutland* to pay half that fee, *viz.* - - | 0 | 7 | 11 |
| *Yorkshire* double - - - - | 1 | 11 | 8 |

Michaelmas *Term.*

The same sheriffs are appofed again on the same writ and proces, and pay the like fees

Easter *Term.*

Sheriffs of cities and towns, and deputies of the cinque ports, each of them then to pay severally upon their appofals, as follows, *viz.*

| | l. | s. | d. |
|---|---|---|---|
| LIncoln, Canterbury, Pool, Glouceſter, Worceſter, Nottingham, Coventry, Southampton, Litchfield, and deputy of the cinque ports - | 0 | 8 | 8 |
| York, Norwich, Exeter, Newcaſtle, and Hull - | 0 | 13 | 4 |
| Briſtol - - - - - | 0 | 10 | 6 |

Michaelmas

## Michaelmas *Term.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| THE ſheriffs of the above cities and towns appoſed then, are to pay the ſame fees as paid in *Eaſter* term, and when ſworn to account, are to pay more - - - - - - | 0 | 3 | 0 |
| Bailiffs of liberties ſworn to account are to pay each - | 0 | 0 | 8 |
| Briſtol Eſcheator is to pay - - - | 0 | 3 | 4 |

## Michaelmas *Term.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| SHeriffs of counties prefixed that term to be ſworn, and to take their accounts in charge before the curſitor-baron, on the ſummons of the Pipe, and before the foreign-appoſer upon the green wax, *viz. Eſſex, Hertford, Kent, Cambridge, Huntingdon, Northampton, Lincoln, Stafford, Worceſter, Wilts, Cornwall, Salop, Berks*, and *Bucks*, are to pay each - | 1 | 9 | 2 |
| *Rutland* is to pay half that fee - - | 0 | 14 | 7 |
| *London* and *Middleſex* is to pay his fees for a whole year - - - - - | 5 | 12 | 0 |
| *London* gauger then ſworn in court is to pay - | 0 | 8 | 8 |

## Hilary *Term.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| SHeriffs of counties ſworn and appoſed before the curſitor-baron and foreign appoſer, as in *Michaelmas* Term, *viz. Surrey, Suſſex, Oxon, Berks, Norfolk, Suffolk, Hereford, Dorſet, Monmouth, Somerſet, Derby, Nottingham, Devon, Glouceſter, Warwick, Southampton*, and *Leiceſter*, are to pay each | 1 | 9 | 2 |
| *York* pays double - - - - | 2 | 18 | 4 |

## Eaſter *Term.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| SHeriffs of *Cumberland* and *Northumberland*, then prefixed and appoſed on the ſummons of the Pipe and green wax, before the curſitor-baron, and foreign appoſer, are to pay each | 1 | 9 | 2 |
| *Weſtmoreland* then to pay his fees for the whole year | 2 | 6 | 8 |
| *Lancaſhire* for the whole year - - | 3 | 10 | 0 |
| *Cheſhire* for the whole year - - - | 3 | 6 | 8 |
| All ſheriffs diſcharged by proclamation in the court, except *York* - - - - | 0 | 15 | 10 |
| *York* is to pay - - - - | 1 | 11 | 8 |

*Caſual*

## *Caſual FEES.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| SHeriffs attached by order of court or warrant - | 1 | 13 | 4 |
| Sheriffs in cuſtody *per diem*, until diſcharged - | 0 | 6 | 8 |

If the marſhal rides into the country, ſix-pence *per* mile forwards, and the ſame backwards, towards his charges, from the ſheriff on whoſe account he goes.

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| Every ſheriff that hath further time given him by order of court, or warrant, to paſs his account, or to be appoſed, to pay - - - - | 0 | 6 | 8 |

## *The FEES to be taken by the four uſhers of his Majeſty's Court of Exchequer.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| OF every high ſheriff when he enters on recognizance in the Exchequer - - | 0 | 8 | 0 |
| Of every ſheriff of a county ſworn to anſwer upon his two appoſals on the King's remembrancer, treaſurer's remembrancer, and firſt-fruits proceſs, for each the ſaid appoſals - - - - | 0 | 8 | 0 |
| Of every ſheriff of a city, *&c.* on each of his ſaid two appoſals - - - - | 0 | 4 | 0 |
| Of every ſheriff of a county ſworn to his account in court, or elſewhere, and on his appoſal on the Pipe proceſs before the curſitor-baron - - | 0 | 18 | 6 |
| Of every ſheriff of a city, *&c.* on the like appoſal | 0 | 4 | 0 |
| Of every ſheriff of a county at his caſting out of court, or finiſhing his account - - | 0 | 8 | 0 |

*London*, *Middleſex* and *Yorkſhire*, to pay double.

## *FEES to be taken by the court-keeper of his Majeſty's Court of Exchequer.*

| | *l.* | *s.* | *d.* |
|---|---|---|---|
| OF every high-ſheriff when he enters on recognizance in the Exchequer - - | 0 | 2 | 0 |
| Of every ſheriff of a county-town to anſwer upon his two appoſals on the King's remembrancer, treaſurer's remembrancer, and firſt-fruits proceſs, for each of the ſaid appoſals - - - | 0 | 2 | 0 |
| Of every ſheriff of a city, *&c.* on each of the ſaid two appoſals - - - - | 0 | 1 | 0 |
| Of every ſheriff of a county ſworn to his account in court, or elſewhere, and on his appoſal upon the Pipe proceſs, before the curſitor-baron - | 0 | 3 | 0 |

| | l. | s. | d. |
|---|---|---|---|
| Of every ſheriff of a city, &c. on the like appoſal | 0 | 1 | 0 |
| Of every ſheriff of a county upon his appoſal on the ſummons of green wax, before the foreign appoſer and clerk of the eſtreats - - | 0 | 2 | 0 |
| If appoſed out of term - - | 0 | 2 | 6 |
| Of every ſheriſh of a city, &c. on the like appoſal | 0 | 1 | 0 |
| Of every ſheriff of a county on his caſting out of court, or finiſhing his accounts - - | 0 | 2 | 0 |

*London*, *Middleſex* and *York*, to pay double.

*FEES to be received by the meſſenger of the ſaid court*, viz.

| | l. | s. | d. |
|---|---|---|---|
| OF every ſheriff of a county ſworn to anſwer upon his two appoſals on the King's remembrancer, treaſurer's remembrancer, and firſt-fruits proceſs, for each of the ſaid appoſals - - - | 0 | 6 | 8 |
| Of every ſheriff of a city for each of the ſaid two appoſals - - - - - | 0 | 3 | 4 |

*London*, *Middleſex* and *York*, to pay double.

*FEES to be received by the tipſtaff in the ſaid court.*

| | l. | s. | d. |
|---|---|---|---|
| OF every high-ſheriff when he enters on recognizance in the Exchequer - - | 0 | 2 | 0 |
| Of every ſheriff of a county ſworn to anſwer upon his two appoſals upon the King's remembrancer, treaſurer's remembrancer, and firſt-fruits proceſs, for each of the ſaid appoſals - - - | 0 | 2 | 0 |
| Of every ſheriff of a city, &c. ſworn to anſwer the like appoſals - - - - | 0 | 1 | 0 |
| Of every ſheriff of a county ſworn to his account in court, or elſewhere, and on his appoſal on the Pipe proceſs before the curſitor-baron - | 0 | 3 | 0 |
| Of every ſheriff of a city, &c. on his appoſal on the Pipe proceſs before the curſitor-baron - | 0 | 1 | 0 |
| Of every ſheriff of a county at his caſting out of court, and finiſhing his account - - | 0 | 2 | 0 |

*London*, *Middleſex* and *York*, to pay double.

*FEES and allowances to be paid to the auditors of Exchequer, for making up and paſſing the under-mentioned ſheriffs accounts,* viz.

| | l. | s. | d. |
|---|---|---|---|
| FOR inrolling a ſheriff's patent, filing the ſeveral certificates, drawing and ingroſſing the account, and for the *quietus*, of the ſheriff of *Cheſhire*, and *Lancaſhire*, the fees for each county to be - | 20 | 0 | 0 |
| For the county palatine of *Durham*, according to ancient cuſtom - - - | 9 | 6 | 8 |
| For caſting out of ſheriffs in open court, except *London* and *Middleſex*, *York* and *Lincoln*, each county | 0 | 10 | 0 |
| For *London*, *Middleſex*, *York* and *Lincoln*, each county | 1 | 0 | 0 |

*FEES to be paid by the ſheriffs of* Wales *to the auditor of* Wales *and* Cheſhire, *and for the ſeveral ſheriffs of* Wales.

| | l. | s. | d. |
|---|---|---|---|
| FOR every old ſeizure charged in the ſheriff's account - - - - | 0 | 1 | 0 |
| For every new ſeizure charged in the ſheriff's account | 0 | 2 | 0 |
| For inrolling a ſheriff's patent, filing the ſeveral certificates, drawing and ingroſſing the account, and for the *quietus eſt* for each county - - | 8 | 18 | 4 |

*The FEES due to the receiver of* North *and* South Wales.

| | l. | s. | d. |
|---|---|---|---|
| FOR every ſheriff upon paſſing his accounts at the audit for ſigning his accounts, and entering in the revenue-book - - - | 2 | 13 | 4 |

*For the ſheriffs of* Cheſhire.

| | l. | s. | d. |
|---|---|---|---|
| FOR inrolling the ſheriff's patent, filing the ſeveral certificates, drawing and ingroſſing the account, and for the *quietus eſt* - - | 20 | 0 | 0 |

By ſtat. 3 *Geo.* 1. *cap.* 16. it is enacted, that from and after the twenty-ninth day of *September*, in the year of our Lord 1717, the yearly ſum of 4000 *l.* ſhall be ſet apart at the receipt of the *Exchequer*, out of ſuch fund as by any act of this ſeſſion of parliament ſhall be charged

with the ſaid yearly ſum, and in ſuch manner as ſhall be thereby appointed, for the uſes and purpoſes hereafter mentioned.

And by the ſaid ſtatute it is further enacted, That there ſhall be yearly and every year paid out of the monies which ſhall from time to time be ſo ſet apart, on the *firſt day of Michaelmas term*, to the ſeveral ſheriffs for the time being, of the ſeveral counties herein after mentioned, the ſeveral and reſpective ſums herein after expreſſed, to enable them reſpectively to bear the expences of the reſpective letters patent for their offices, and to paſs their reſpective accounts, and to obtain their reſpective *quietus's*; the ſaid yearly ſums to be received without any account, or impreſt whatſoever to be ſet upon them, or any of them, and without paying any fees or charges for the ſame, or any part thereof; that is to ſay,

To the reſpective ſheriffs which ſhall be appointed for the county of *Bedford*, ninety-three pounds and ſix ſhillings.

For the county of *Berks*, ninety-ſix pounds.

For the county of *Bucks*, ninety-ſix pounds.

For the counties of *Cambridge* and *Huntington*, ninety-five pounds and ten ſhillings.

For the county of *Cheſhire*, ſixty-two pounds and five ſhillings.

For the county of *Cornwall*, one hundred and two pounds and ſixteen ſhillings.

For the county of *Cumberland*, ninety pounds and two ſhillings.

For the county of *Derby*, ninety-three pounds and nineteen ſhillings.

For the county of *Devon*, one hundred and ſix pounds nine ſhillings.

For the county of *Dorſet*, one hundred and one pounds ſix ſhillings.

For the county of *Eſſex*, one hundred and eight pounds ten ſhillings.

For the county of *Glouceſter*, ninety-eight pounds and ten ſhillings.

For the county of *Hereford*, ninety-four pounds and ſix ſhillings.

For the county of *Hertford*, ninety-three pounds.

For the county of *Kent*, one hundred and eight pounds ten ſhillings.

For the county of *Lancaſter*, ſixty-ſeven pounds and ſeven ſhillings.

For the county of *Leiceſter*, ninety-four pounds.

For the county of *Lincoln*, one hundred and one pounds and three ſhillings.

For the county of *Middleſex*, one hundred and nineteen pounds and three ſhillings.

For the county of *Monmouth*, eighty-nine pounds and three ſhillings.

For the county of *Norfolk*, one hundred and one pounds fifteen ſhillings.

For the county of *Northampton*, ninety-ſix pounds.

For the county of *Northumberland*, ninety-one pounds.

For the county of *Nottingham*, ninety-five pounds and thirteen ſhillings.

For,

For the county of *Oxon*, ninety-ſeven pounds and ſeven ſhillings.
For the county of *Rutland*, ſixty-nine pounds and eleven ſhillings.
For the county of *Salop*, ninety-eight pounds and three ſhillings.
For the county of *Somerſet*, one hundred and twelve pounds nineteen ſhillings.
For the county of *Southampton*, one hundred and one pounds three ſhillings.
For the county of *Stafford*, nine-five pounds and ten ſhillings.
For the county of *Suffolk*, one hundred and two pounds and twelve ſhillings.
For the county of *Surry*, ninety pounds and two ſhillings.
For the county of *Suſſex*, ninety pounds and five ſhillings.
For the county of *Warwick*, ninety-three pounds and ten ſhillings.
For the county of *Wilts*, one hundred and four pounds and ten ſhillings.
For the county of *Worceſter*, ninety-eight pounds and three ſhillings.
For the county of *York*, one hundred and fifty pounds.
For the county of *Angleſea*, thirty pounds.
For the county of *Brecon*, thirty pounds.
For the county of *Cardigan*, thirty pounds.
For the county of *Carmarthen*, thirty pounds.
For the county of *Carnarvon*, thirty ſhillings.
For the county of *Denbigh*, thirty pounds.
For the county of *Flint*, thirty pounds.
For the county of *Glamorgan*, thirty pounds.
For the county of *Merioneth*, thirty pounds.
For the county of *Montgomery*, thirty pounds.
For the county of *Pembroke*, thirty pounds.
For the county of *Radnor*, thirty pounds.
And to the ſheriff of *Weſtmorland*, for the time being, forty pounds and ſix ſhillings.

## *Inſtructions to ſheriffs under the ſeveral ſtatutes relating to elections.*

BY ſtat. 5 *Rich.* 2. *cap.* 4. Negligence in returning the writ, or leaving out any city or borough, is puniſhable by amerciament.

By ſtat. 7 *Hen.* 4. *cap.* 15. For election of knights, the ſheriff is at the next county court after receipt of the writ to proclaim in full court the day and place of the parliament, and proceed to election; and tack an indenture to the writ, with the names of the elected, under the ſeals of the ſheriff and electors. And by 11 *Hen.* 4. *cap.* 1. he incurs a penalty of one hundred pounds to the king, upon inqueſt found before judges of aſſize of his making any return contrary to 7 *Hen.* 4. *c.* 15. And by 6 *Hen.* 6. *cap.* 4. he may traverſe ſuch inqueſt.

By ſtat. 8 *Hen.* 6. *cap.* 7. Electors of knights are to have forty ſhillings a year, to be ſworn by the ſheriff. This is to be inquired of

of by judges of aſſize: the penalty of one hundred pounds to the king, and a year's impriſonment.

By ſtat. 23 *Hen.* 6. *cap.* 15. He is to make precepts to mayors, *&c.* within his county, reciting the writ, and commanding them to chuſe by citizens, *&c.* and the mayor, *&c.* is to return the precept by indenture with the ſheriff, which the ſheriff is to return. Offences againſt this, or any former ſtatute, liable to the penalty in 8 *Hen.* 6. and 100 *l.* with coſts to the perſon elected, by action of debt; and mayors, *&c.* in like caſe forty pounds and coſts. Elections for counties to be held between the hours of eight and eleven before noon. Actions to be commenced, *&c.* within three months after the parliament begins.

*Note*, Elections in *Monmouthſhire*, *Wales*, *Cheſhire*, and *Durham*, are directed by ſtatutes 27 *Hen.* 8. *cap.* 26. 34 & 35 *Hen.* 8. *cap.* 13. 35 *Hen.* 8. *cap.* 11. 25 *Car.* 2. *cap.* 9.

By ſtat. 7 & 8 *Will.* 3. *cap.* 7. Returns contrary to the laſt determination of the Houſe of Commons are falſe returns; and the party grieved recovers double damages, with full coſts. The like remedy for wilful malicious double returns; and ſecureties given for ſuch returns are void. Forfeiture for ſuch contract 300 *l.* Actions to be within two years after cauſe of action.

By ſtat. 7 & 8 *Will.* 3. *cap.* 25. Forty days to be between the *teſte* and return; the writ to be delivered to the proper officer only, who is to indorſe the day of the receipt, and forthwith make out precepts to mayors *&c.* and cauſe them to be delivered to mayors, *&c.* who are alſo to indorſe the day, *&c.* and give four days notice, *&c.* and proceed to election within eight days from the receipt. No fee due for receipt, delivery or return. The election for counties to be at the moſt uſual place within forty years laſt paſt, and at the next county court, unleſs it happens, within ſix days after receipt of the writ, or upon the ſame day. In that caſe he is to adjourn, and give ten days notice. And he, or his under ſheriff, is to take a poll, if required, and appoint clerks, *&c.* to be ſworn, *&c.* and inſpectors for the candidates. The freeholders to be ſworn. And he is not to make any unneceſſary adjournment, nor to any other town without conſent of candidates, and to deliver a copy of the poll at a reaſonable price for writing, on forfeiture of 500 *l.* to the party grieved. Perſons not eligible under twenty-one years of age. the ſheriff of *Hampſhire*, at the requeſt of a candidate, may adjourn to *Newport*, when all the freeholders are polled at *Wincheſter*.

By ſtat. 7 & 8 *W.* 3. *cap.* 27. The oaths enacted by 1 *W.* & *M.* to be tendered to every voter, at the requeſt of any candidate, or declaration to quakers.

By ſtat. 10 & 11 *W.* 3. *cap.* 7. Returns to be made with all convenient expedition to the clerk of the crown. Fees four ſhillings for a knight, and two ſhillings for a citizen, *&c.* The officers of the *cinque ports* to have ſix days for the delivery of a precept notwithſtanding

withſtanding 7 & 8 *W.* 3. *cap.* 25. Not making due returns according to this act forfeit 500*l.* By 6 *Annæ*, *cap.* 6. Directions for *Scotland*. By 6 *Annæ*, *cap.* 23. Electors to take the abjuration oath, (or, being a quaker, the declaration) at the requeſt of a candidate.

By ſtat. 9 *Annæ*, *cap.* 5. Candidates (except eldeſt ſons of peers, or of perſons qualified to ſerve for ſhires, or candidates for the univerſities) are to take an oath of their qualification, being required; (for which ſee the act) the ſame to be certified into *Chancery*. Fees, one ſhilling for the oath, two ſhillings for the certificate, and two for the filing.

By ſtat. 10 *Annæ*, *cap.* 23. Freeholders, if required by a candidate, to be ſworn; and the *jurat* entered to their names and place of freehold and abode. Poll books to be delivered within twenty days to the clerk of the peace, on oath before the two next juſtices, *quorum unus*, *affirmate*, againſt the name of quakers.

By ſtat. 2 *Geo.* 2. *cap.* 24. Preſiding officer to adminiſter *gratis* the oath of affirmation againſt bribery; forfeiture 50*l.* and full coſts; and polling before taking oath, if demanded, officer forfeits 100*l.* and full coſts, and voters the like. And officer immediately after reading the writ or precept is to take the oath for a return, (for both which oaths ſee the act) before any juſtice, or any three electors. Officers are to read this act immediately after the writ. Officers for every wilful offence againſt the ſame forfeit fifty pounds. Proſecutions to commence within two days after the offence.

By ſtat. 13 *Geo.* 2. *cap.* 20. it is enacted, That no perſon ſhall vote for electing any knight of a ſhire in *England*, unleſs ſuch perſon has been aſſeſſed to public taxes, church-rates and pariſh-duties, in ſuch proportion as other lands of 40*s.* *per annum*, within the ſaid pariſh or townſhip where the ſame ſhall lie, nor unleſs ſuch perſon ſhall have received the ſame for one whole year before ſuch election, except ſuch lands come by deſcent, &c. within the time; on penalty of 40*l.*

By ſtat. 15 *Geo.* 2. *cap.* 22. it is enacted, That after the end of that parliament, no commiſſioners, their deputies or clerks, in the ſeveral offices therein mentioned, ſhall ſit or vote in any parliament; and any ſuch perſon to forfeit 20*l.* for every day he ſhall ſit or vote in the ſaid houſe. This act not to exclude the treaſurer, &c. of the navy and ſome other officers.

By ſtat. 16 *Geo.* 2. *cap.* 11. The ſtatutes for elections of members of parliament for *Scotland* are explained and amended, and to regulate the conduct of returning officers at ſuch elections.

By ſtat. 18 *Geo.* 2. *cap.* 18. it is enacted, That after the 24th of *June* 1745, at every election for knight or knights of the ſhires in *England* and *Wales*, inſtead of the oath by 10 *Ann.* every voter is to make oath that he has a freehold eſtate of the clear yearly value of 40*s.* and to ſpecify the names of the poſſeſſors of the lands, and the place where they lie, &c.

Perſons guilty of perjury or ſubornation of perjury, under the ſame penalty as by ſtat. 5. *Eliz.* and 2 *Geo.* 2. and clauſes 10th and 12th of *Ann. repealed.*

Booths to be erected, not exceeding fifteen in each county, three days before the poll, and the ſheriff to appoint clerks to each booth at the expence of the candidates.

Alſo a liſt of the towns to be polled at each booth, and the voting to be regulated by the ſaid liſt; and no ſheriff to adjourn a county court longer than ſixteen days; and the clauſe of 6 *Geo.* 2. *repealed* ſo far as it relates to holding of county courts.

By ſtat. 31 *Geo.* 2. *cap.* 14. it is enacted, That after the 24th day of *June* 1758, no perſon who holds his eſtate by copy of court roll ſhall be entitled thereby to vote at the election of any knight of the ſhire within *England* or *Wales.*

If any perſon ſhall vote, his vote ſhall be void, and he ſhall forfeit to the candidate for whom ſuch vote was not given, and who ſhall firſt ſue for the ſame, 50 *l.* to be recovered by him, his executors and adminiſtrators, together with full coſts of ſuit, by action of debt in any of the courts at *Weſtminſter*, wherein no *eſſoign* ſhall be admitted, and the proof ſhall lie on the perſon againſt whom ſuch action ſhall be brought.

It ſhall be ſufficient for the plaintiff to ſet forth in his declaration, that the defendant is indebted to him in 50*l.* and to alledge the offence for which the action is brought; and that the defendant has acted contrary to the act, without mentioning the writ of ſummons to parliament, or the return thereof, or any warrant or authority to the ſheriff grounded upon any ſuch writ of ſummons.

Action to be commenced within nine calendar months.

All ſtatutes of *jeofails*, and amendments of the law, to extend to all proceedings in any ſuch action.

If the plaintiff ſhall *diſcontinue*, or be *nonſuited*, or judgment be otherwiſe given againſt him, the defendant ſhall recover his *treble* coſts.

By ſtat. 33 *Geo.* 2. *cap.* 20. it is enacted, That after the determination of the then parliament, every perſon (except as as therein is excepted) who ſhall be elected a member of the Houſe of Commons, ſhall, before he preſumes to vote or ſit there, during any debate after the ſpeaker is choſen, deliver to the clerk thereof, at the table, in the middle of the ſaid houſe, and whilſt it is duly ſitting, with their ſpeaker in the chair, an account ſigned by ſuch member, containing the name of the pariſh and county in which the lands, *&c.* do lie, whereby he makes out his qualification of 600 *l.* a year, above *reprizes*, if a knight of a ſhire; and of 300 *l.* a year above *reprizes*, of a citizen, burgeſs, or baron of the *cinque ports*; and ſhall alſo, at the ſame time, take and ſubſcribe the following oath; *viz.*

" I *A. B.* do ſwear, That I truly and *bona fide* have ſuch eſtate " in law or equity, and of ſuch value, to and for my own uſe and " benefit, of or in lands, tenements, or hereditaments, over and

" above

" above what will ſatisfy and clear all incumbrances that may affect " the ſame, as doth qualify me to be elected and returned to ſerve " as a member for the place I am returned for, according to the te- " nor and true meaning of the acts of parliament in that behalf; " and that ſuch lands, tenements, or hereditaments, do lie as de- " ſcribed in the paper or account ſigned by me, and now delivered " to the clerk of the Houſe of Commons.

" So help me God."

And the Houſe of Commons is hereby impowered and required to adminiſter the ſaid oath and ſubſcription, as occaſion ſhall be, to every perſon duly demanding the ſame, immediately after ſuch perſon ſhall have taken the oaths of allegiance, ſupremacy, and abjuration, ſhall be entered in a parchment roll to be provided by the clerk of the houſe; and the ſaid account ſo ſigned and delivered in, ſhall be ſigned by him.

If any perſon ſhall be elected to ſerve in any future parliament as a knight of a ſhire, or as a citizen, burgeſs, or baron of the *cinque ports*, ſhall preſume to ſit or vote as a member of the houſe, before he has delivered in the ſaid account, and taken and ſubſcribed the ſaid oath, or ſhall not be qualified according to 9 *Ann. cap.* 5. and this act, his election ſhall be void, and a new writ ſhall be iſſued to elect another member in the ſaid perſon's room.

This act is not to extend to the eldeſt ſon or heir apparent of any peer or lord of parliament, or of any perſon qualified to ſerve as a knight of a ſhire, or to the members of either of the univerſities in *England*, or to the members for *Scotland*.

## COUNTY COURT.

THIS court is incident to the office of *ſheriff*, and ſo is the entry of all proceedings there. It is not of record, but only a *court baron*, and the ſuitors are judges.

If the *King* grants the office of *clerkſhip* of the *county court* to any one, and conſtitutes another *ſheriff* of the ſame county, it is a void *patent*, though ſuch grant ſhould be made when the *ſheriffwick* is vacant, for the new ſheriff muſt have the office.

In all writs directed to the ſheriff concerning the *county court*, the words in the writ are, *in your county*, and in the return of writs of *exigents*, the ſheriff ſaith, *at my county held &c.* In writs of *falſe judgment*, the words are, *in your full county you cauſe the plaint to be entered &c. under your ſeal &c.* In the precept of a *tolt*, to remove the plea out of the *court baron* into the *county court*, the words are, *that you ſummon &c.* and that he be *at your county.*

The ſtile of the court is to the following effect:

*Surry*, to wit. *The firſt court of the county of* W. W. *Eſq; ſheriff of the county aforeſaid, holden at* &c.

*Note*, This is varied according to the nature of the caſe.

In this court the ſuitors are judges, yet in ſome caſes, by *preſcription*, the ſheriff may be judge.

This court holds no ſuits of *charters* for *lands*, or for *inheritance*, or to make *plaints* on one entire debt, nor any action to compel one to render an *account*, though it be under 40 *s.* becauſe the ſheriff cannot aſſign *auditors* who are judges of the record, and the *county court* is no court of record.

The *ſheriff* cannot hold plea of any debt due by record, yet if the debt be 40 *s.* or above, and the plaintiff will acknowledge in his declaration, the receipt of ſo much as to bring it within 40 *s.* a plaint may be taken out in the *county court* for the ſame, and it ſhall be held good, but the plaintiff in the plaint cannot ſplit a debt into ſeveral actions, and if he does, the defendant may plead the ſame to the *juriſdiction* of the court, or he may have a *writ of prohibition* to ſtay ſuch indiſcreet ſuit, or may move the courts at *Weſtminſter* for an *attachment*.

This court cannot hold any action of treſpaſs *with force and arms*, becauſe a *fine* in ſuch action is due to the *King*; but this court cannot *aſſeſs* a *fine*, becauſe it is no court of record.

By ſtatute 9 *Hen.* 3. *cap.* 3. and 2 *Edw.* 6. *cap.* 25. This court muſt be holden once every month, on a day certain. The months in this caſe are computed by *twenty-eight days*.

By ſtatute 23 *Geo.* 2. *cap.* 33. The *ſheriff* of *Middleſex*, or his *county clerk* is to hold his *county court*, in purſuance of this act, on *Thurſday* in every week, at ſome place within the hundred of *Oſſulſton*, in the county of *Middleſex*, and on the firſt *Tueſday* in every month, at ſome place within the hundreds of *Iſleworth* or *Elthorne*, and on the laſt *Tueſday* in every month at ſome place within the hundred of *Edmonton*; *Provided* the monthly court of the ſaid ſheriff be held as has been accuſtomed.

This court is kept once a month at a day certain, becauſe the *King's* writs of *exigents* are proclaimed therein, and the *writ of exigent* muſt be directed to the ſheriff in his *county court*, and the *ſheriff* on ſuch writ is to proclaim or call the parties (ſued in the courts at *Weſtminſter*) to render their bodies &c. or elſe to be out of the *King*'s protection.

The *Coroners* are to ſit with the ſheriffs at every *county court* there, to give judgment in *outlawries*. In *London*, the judgment on *outlawries* is given by the *Recorder*.

For the purpoſe of giving judgment on *outlawries* &c. the *county court* is deemed a court of *record*.

The *county court* may be held at any place within the *county*, at the pleaſure of the *ſheriff*, but not out of the *county*.

By *ſtat.* 2 *Edw.* 6. *cap.* 25. The ſheriff of *Northumberland* is to hold his *county court* in the town or caſtle of *Alnwick*, and no where elſe.

The *ſheriff* of *Suſſex* is to hold his *county court* one time at *Chicheſter*, and another time at *Lewis*, and ſo alternately through the year.

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The *original* proceſs of the *county court* is *ſummons*, *attachment*, and *diſtreſs infinite*.

*Note*, For a debt due to another under 40 *s.* where both the parties live in the country, a *diſtringas* or *county warrant* may iſſue.

## *Executions in the county court.*

The ſafeſt way in the *county court* is, to have a *writ de executione judicii* directed to the *ſheriff &c.* and then the ſheriff may make execution as in a court of *record* by *fire fac.* or *levari*.

## *On non appearance to diſtringas.*

If the defendaant does not appear the next court day after the *diſtringas* is executed, the plaintiff may ſue out a *duces tecum* to compel him to appear, and then an *alias* and *pluries duces tecum*, and ſo *ad infinitum*.

## *As to ſummons in the county court.*

The ſheriff may, before any *county court*, award a *ſummons* to his bailiff, returnable within *two or three days*, at his pleaſure, to *ſummon* the defendant, by his goods, to anſwer *&c.* and if the bailiff return on ſuch *ſummon* a *nihil*, and the plaintiff moves the plaint by *pone* into the *C. B.* that court will not grant a *capias*.

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At the end of every *county court*, the *ſheriff* muſt appoint a day certain for the next *county court*, in order that the county may know at

what time to resort thereto, in order to hear the King's writs of *exigents*, and *proclamations* read.

### *What matters are cognizable in the county court.*

All matters touching a *replevin* by *plaint*, are heard and determined in the *county court*.

On a writ of *justicies* issuing out of *Chanchery*, directed to the *sheriff*, he is empowered to hold pleas in the *county court* for actions of 40*s.* or above, in *debt*, *detinue*, *case* &c. and other personal actions. This writ is called a *justicies*, because it is a *commission*, and not an *original*, directed to the sheriff to do a man *right* and *justice*. It is *vicountiel*, and not returnable, and, though directed to the *sheriff*, the *suitors* of the court are the judges; the writ of *false judgment* lies on their erroneous judgment, and it is not necessary to be returned, unless the action be removed by writ of *recordari*, and then the *justicies* must be returned with the *record*.

On a writ of *justicies*, the *sheriff* may hold plea of *account*, of *admeasurement of dower and admeasurement of pasture*.

This writ is brought to compel a man where he ought to inclose his ground against his neighbours ground, in *debt* for money or goods, and in *detinue*.

A *justicies* may be brought for a *nusance* and *trespass*, and the sheriff may hear and determine the *trespass* by an inquest of *twelve men*, according to the rule of *common law*, and the plaintiff may account to his damage of 30*l.* or more.

By this writ, the *sheriff* may hold plea of a bond of one thousand *merks* &c.

### *The forms of various writs brought, to give the sheriff cognizance of suits in his county court.*

### *Form of writ of justicies in account.*

GEORGE the Third &c. To the sheriff &c. *greeting*: WE command you, that you justice *C.* that justly and without delay, he render to *A.* his reasonable account, for the time in which he was his bailiff in *B.* and receiver of the money of him the said *A.* as he may reasonably shew, that he ought to render to him, that we may hear no more clamour thereupon for want of justice. Witness &c.

If this writ is brought by an executor, it runs in the following form:

*That* he render to *J.* and *K.* executors of the testament of *A.* his reasonable account for the time in which he was bailiff of him the said

*A.*

*A.* in *B.* and receiver of the money of him the ſaid *A.* deceaſed, as he may reaſonably ſhew *&c.*

*Note,* If merchants or traders occupy their goods and merchandize *in common* for their common profit, one of them may bring an action of *account* againſt the other in the *county court*, or in the *C. B.* and the writ in the *county court* muſt be in the following form:

*Form of the writ of juſticies in the county court, between merchants* &c.

*GEORGE* the Third *&c.* To the ſheriff *&c. greeting:* WE command you, that you juſtice *C.* a merchant, that juſtly *&c.* he render to *A.* a merchhant, a reaſonable account for the time in which he was receiver of the money of him the ſaid *A.* from whatever cauſe and contract coming to the common profit of them the ſaid *A.* and *C.* as by the law of merchants he may reaſonably ſhew that he ought to render to him *&c.*

*Note,* The clauſe, *viz. from whatever cauſe or contract*, muſt be inſerted in the writ, whether the ſame be ſued out in the *C. B.* or the *county court.*

This writ may be brought by the executor of one merchant againſt the other merchant, but not againſt his executor; and the ſame is in the following form.

*Form of the writ of juſticies, brought by the executor of one merchant againſt another.*

*GEORGE* the Third *&c.* To the ſheriff *&c. greeting: Command C.* that he render to *A.* a reaſonable account for the time in which he was receiver of the money of him the ſaid *A.* or bailiff of him the ſaid *A.* and *unleſs* he will do it, and the aforeſaid *A.* ſhall make you ſecure of proſecuting his claim, then ſummon the aforeſaid *C.* that he be before our juſtices at *Weſtminſter*, in *(the return)* to ſhew wherefore he will not do it; and have there the ſummons and this writ *&c.*

*Note,* The *writ of account* ſued out in the *county court*, may be removed by the plaintiff into the *C. B.* by writ of *pone*, without any cauſe ſhewn for the removal of ſuch writ; but if the ſame is removed out of the *county court* by the defendant, he muſt, in his writ, ſhew cauſe for ſuch removal.

If

If the defendant pleads a foreign releaſe to the action of *account*, then the writ of *pone* for the removal of the ſuit ſhall have the following words:

" BECAUSE the aforeſaid defendant, in pleading in our court " in *C.* in which the plea depends by return of our writ, has produ- " ced a certain writing of acquittance under the name of him the " ſaid *A.* containing in itſelf, that he the aforeſaid *A.* had releaſed " all actions which he had againſt the ſaid *C.* the defendant, by rea- " ſon of the account aforeſaid to him the ſaid *C.* in the county of *S.* " made, as it is ſaid; which ſaid writing the aforeſaid *A.* has abſo- " lutely denied: WHEREFORE becauſe that plea ought not to be " further carried on in the court aforeſaid, let execution of this writ " be done, if the cauſe be true, and otherwiſe not."

*Note*, There is another form of a *writ of account* grounded on *ſtat. Marlbridge, cap.* 23. which lies where a man ought to make *account* as bailiff or receiver, and has no lands or tenements, by which he may be diſtrained, but is vagrant in ſecret places where he cannot be found, then the plaintiff ſhall have a *writ of account*, which is called *monſtravit* on the *ſtatute*, and is in the following form.

*Form of the writ of monſtravit* &c. *under the ſtatute* Marlbridge &c.

GEORGE the Third *&c.* To the ſheriff *&c. greeting: A.* has ſhewn unto us, that WHEREAS *C.* was his bailiff in *S.* having the care and adminiſtration of all his affairs and goods, the ſame *C.* his account not being paid, ſeeking *ſubterfuges*, lies hid in your bailiwick, nor can he be found and diſtrained, to render to the ſaid *A.* his account aforeſaid; and becauſe by common council of our realm, *It is provided*, That if bailiffs who are bound to render their account to their lords, do withdraw themſelves, and have not lands or tenements whereby they may be diſtrained, they ſhall be attached by their bodies, ſo that the ſheriff in whoſe bailiwick they be found, ſhall cauſe them to come to render their account, WE command you, that if the aforeſaid *A.* ſhall make you ſecure of proſecuting his claim, then attach the aforeſaid *C.* ſo that you may have him before our juſtices *&c.* on ſuch a day, to render to the aforeſaid *A.* his account aforeſaid, as he may reaſonably ſhew, that he ought to render to him *&c.* and have *&c.*

*Note*, This writ is now diſuſed, becauſe by *ſtat. Weſtminſter* 2. *cap.* 2. and made after *ſtat. Marlbridge, cap.* 23. the party may have proceſs of *outlawry* againſt the bailiff or receiver in a writ of *account*; but notwithſtanding he may ſue out a *writ of Monſtravit* in the following form.

*Form*

*Form of the writ of monſtravit under ſtat.* Weſtminſter, *cap.* 2.

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* *A.* has ſhewn unto us, that WHEREAS *C.* was receiver of the money of him the ſaid *A.* and his bailiff in *S.* the ſame *C.* his account not being paid, ſeeking *ſubterfuges*, lies hid in your bailiwick *&c.* WE command you, that if the aforeſaid *A.* ſhall make you ſecure of proſecuting his claim, then attach the aforeſaid *C.* ſo that you may have him before *&c.* and yourſelves, at your *&c.* to render to the aforeſaid *A.* his account aforeſaid *&c.* and have *&c.*

A *writ of account* lies againſt a guardian in *ſoccage*; but the writ differs from the writ againſt bailiff *&c.* and is in the following form.

*Form of the writ of account againſt a guardian in ſoccage.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* If *A.* make you ſecure *&c.* then ſummon *&c. C.* that he be before our juſtices *&c.* to ſhew wherefore, WHEREAS it is provided by the common council of our realm, that guardians of lands and tenements which are held in *ſoccage*, ſhall give to the heirs of thoſe lands and tenements, when they ſhall come to full age, their reaſonable account of the iſſues forthcoming of thoſe lands and tenements, for the time in which they had that *wardſhip*, by reaſon of the minority of the heirs aforeſaid, he the ſaid *C.* refuſes to render to the aforeſaid *A.* his reaſonable account of the iſſues forthcoming of the lands and tenements in *S.* which are holden in *ſoccage*, and whereof the ſaid *C.* had the *wardſhip* while the aforeſaid *A.* was under age, as it is ſaid. And therefore *&c.*

*The writ of debt.*

This writ lies where one perſon owes another a certain ſum of money, by bond or bargain, for a thing ſold, or by contract, on a loan made by the creditor to the debtor, and the debtor will not pay the debt at the day appointed that he ought to pay it, then the creditor ſhall have an action of *debt* againſt him for the ſame, which may be ſued in the *county court* before the *ſheriff* by *juſticies*, as well as in the *C. B.* and the form of the writ is ſometimes in the *debet* and *detinet*, and ſometimes in the *detinet* only, and not in the *debet*; if it be in the *debet*, it ſhall abate.

This writ muſt always be in the *debet* and *detinet*, when the perſon who makes the bargain or contract, or lends the money, or he to whom the bond is made brings the action againſt the other, and the money borrowed is delivered by this writ.

*Form*

*Form of the writ of juſticies in debt.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE command you, that you juſtice *C.* that juſtly and without delay he render to *A.* 20 *l.* which he owes him, as it is ſaid, as he can reaſonably ſhew that he ought to render it to him, that we hear no more clamour for want of juſtice &c. Witneſs &c.

If the ſuit be for goods or chattels, other than money, the form of the writ muſt be thus.

*Form of the writ of juſticies for goods* &c.

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE command you, that you juſtice *C.* &c. that he render to *A. (here inſert the things ſued for by this writ, with the value of the ſame)* which he unjuſtly detains from him &c.

If a *writ of debt* be brought in the *county court* before the ſheriff by *writ of juſticies*, the plaintiff may remove the plea into the *C. B.* by a *writ of pone*, without ſhewing cauſe in the writ for ſuch removal; but the defendant cannot remove the ſame out of the *county court*, without ſhewing cauſe for ſuch removal in the *writ of pone*; yet notwithſtanding at the end of the writ, theſe words are uſed;

" *Let the examination of this writ be done, if the cauſe be true, other-*
" *wiſe not.*"

There are many cauſes of removal of this plea from the *county court*, viz.

If the defendant pleads a foreign plea, which cannot be tried in the *county court* &c. or if the defendant ſhews, that he before whom the plea is depending doth maintain the plaintiff, or favour him &c. and the plea of *debt* be ſued within any *liberty* or *franchiſe* &c. the plaintiff may remove the plea by *writ of recordari* into the *C. B.* without ſhewing any cauſe in the writ.

If the defendant remove the plea by *writ of recordari* into the *C. B.* out of any *liberty* or *franchiſe*, he muſt ſhew cauſe for ſuch removal in the writ.

If the ſheriff remove the plea out of the *county court* by a *writ of pone* at the ſuit of plaintiff or defendant, and after ſuch removal, the bailiffs or officers of the court proceed in the plea, and give judgment, and award execution &c. then the defendant, or the perſon againſt whom the judgment is given, or execution awarded, ſhall have an *attachment* againſt the bailiffs, or thoſe who ſo proceeded to judgment &c. to anſwer as well the King for the *contempt*, as the party for his damages &c. and the writ in ſuch caſe is in the following form.

*Form of the writ of debt in the* C. B.

GEORGE the Third &c. To the ſheriff of &c. *greeting:* COMMAND *C.* that juſtly &c. he render to *A.* ——————, which he owes to him, and unjuſtly detains, as it is ſaid; and unleſs he will do it, and the aforeſaid *A.* ſhall make you ſecure &c. then ſummons by good ſummoners the aforeſaid *C.* &c.

*Note*, In a *writ of debt* of chattels it is never ſaid, "That he owes "to him." If the writ be brought by executors for a duty due to their teſtator, the writ muſt be, "*which he detains from them*," and not "*owes to and detains*," becauſe the executors were not parties to the original contract.

If the *writ of debt* be brought by the creditors againſt the executors for the debt of their teſtator, the writ muſt be, "*which they detain* "*from him*," although ſuch writ is for money; for example,

If a perſon makes *J.* and another his executors, and is indebted unto a third perſon, the action muſt be brought againſt the executors in the following form.

*Form of the writ of debt againſt executors.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *J.* and *C.* executors of the laſt will and teſtament of *A.* deceaſed, that &c.

If the executors bring an action againſt a perſon indebted to their teſtator, the form of the writ muſt be as follows:

"COMMAND *D.* &c. that he render to *J.* and *C.* executors of "the laſt will and teſtament of *A.* deceaſed &c."

If this writ be brought againſt the *heir at law* on an obligation of his *anceſtors*, the writ muſt be in the following form.

*Form of the writ of debt againſt an heir at law.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *G.* the ſon and heir of *H.* that he render to *A.* &c.

If there are ſeveral *heirs*, then each muſt be particularly deſcribed in the writ, according to his degree of conſanguinity.

If a man be in debt, and dies inteſtate, or the executors refuſe to take on themſelves the executorſhip, whereby the goods and chattels of the inteſtate &c. come to the hands of the *Ordinary*, his creditors

may have an action of debt againſt the *Ordinary*, by the ſtatute of *Weſtminſter* 2. *cap.* 19. in the following form.

*Form of the writ of debt againſt the Ordinary.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *T.* biſhop of *C.* to whoſe hands came the goods and chattels which were of *A.* who died inteſtate, as it is ſaid, that juſtly &c. he render &c.

If the goods come to the hands of the *Ordinary*, and he afterwards makes a will, and appoints executors, and dies, in that caſe the creditor of the original debtor may bring an action of *debt* againſt the executors of the *Ordinary*, and the writ ſhall be in the following form.

*Form of the writ of debt againſt the executors of the Ordinary.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *J.* of &c. and *B.* of &c. executors of the laſt will and teſtament of (*the Ordinary, deſcribing him by his eccleſiaſtical title*) to whoſe hands came the goods and chattels which were of the ſaid *A.* who died inteſtate, as it is ſaid, that juſtly &c. he render &c.

*The writ of ſectam ad molendinum.*

This writ is ſometimes *vicontiel*, and may be ſued in the *county court* by writ of *juſticies*, or in the *C. B.* by a *precipe*, at the election of the plaintiff.

By *preſcription* a man may have ſuit to his mill of the villains of a ſtranger, and have a writ *ſectam ad molendinum* againſt them. If in the *county court*, the writ muſt be in the following form.

*Form of the writ of juſticies ſectam ad molendinum in the county court.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE command you, that you juſtice *A.* that juſtly and without delay he do his ſuit to the mill of *E.* of *N.* in *S.* which he owes to it, and has been uſed to do, as it is ſaid, as he can reaſonably ſhew that he ought to do the ſame to it, that we may have no more clamour for want of juſtice. Witneſs &c.

If this writ iſſues from the *C. B.* by *precipe*, it muſt be in the following form.

*Form*

*Form of the precipe in the* C. B.

COMMAND *A.* that juſtly and without delay he do ſuit to the mill of *E.* of *N.* in *S.* which he owes to it, and has been uſed to do, as it is ſaid; and unleſs he will do it *&c.* then ſummon *&c.*

*The writ quod permittat,*

Lies where a perſon has common of paſture for his cattle, and he is diſturbed by a ſtranger, ſo that he cannot uſe his common.

This writ may be ſued by *juſticies* in the *county court*, or in the *C. B.* If by *juſticies* in the *county court*, the writ is in the following form.

*Form of the writ quod permittat, when by juſticies in the county court.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* WE command you, that you juſtice *A.* that juſtly *&c.* he permit *B.* to have common of paſture in *J.* for ſheep *(or whatever elſe it may be for)* which he ought to have, as it is ſaid, as he can reaſonably ſhew, that we may hear no more clamour thereupon *&c.*

If this writ is ſued in the *C. B.* it muſt be in the following form.

*Form of the writ quod permittat in the* C. B.

GEORGE the Third *&c.* To the ſheriff *&c. greeting.* COMMAND *A.* that juſtly *&c.* he permit *B.* to have common of paſture in *S.* and ——— acres of wood, which he ought to have, as it is ſaid; and unleſs he will do it, and the aforeſaid *B.* ſhall make you ſecure *&c.* then ſummon *&c.*

*Note*, This writ is uſed for many purpoſes, varying the writ according to the nature of the thing wanted to be redreſſed.

The proceſs on this writ is *ſummons*, *attachment*, and *diſtreſs*; and if the ſheriff on the ſummons returns *nihil*, the plaintiff may have a *capias*.

*Note*, If a man build a houſe or a wall, or make any other erection that is a nuiſance unto the freehold of another, and the perſon ſo erecting the ſame dies, the perſon who has ſuſtained an injury by ſuch nuiſance may have this writ againſt the heirs of the perſon who committed the nuiſance, in the following form.

*Form of the writ quod permittat againſt an heir for a nuiſance committed by his anceſtors.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *A.* that juſtly &c. he permit *B.* to pull down a certain houſe (*or other thing erected, which is deemed a nuiſance*) which *R.* the father or other anceſtor of the ſaid *A.* whoſe heir he is, unjuſtly and without judgment built, to the nuiſance of the free tenement of *C.* the father or other anceſtor of the ſaid *B.* whoſe heir he is, in (*the place where the erection was made, deſcribing the ſame particularly*) after the firſt &c. as it is ſaid; and unleſs he will do it &c.

*Note*, A writ *quod permittat* againſt a fair or market may be ſued in the *Common Pleas* in the following form.

*Form of the writ quod permittat againſt a fair or market, in the* C. B.

GEORGE the Third &c. To the ſheriff &c. *greeting:* IF *A.* ſhall make you ſecure &c. then ſummon *B.* &c. that he be before our juſtices &c. to ſhew wherefore he has ſtopt up a certain marſtet (*or as the caſe may be*) to the nuiſance of the free market &c. of him the ſaid *A.* in (*the place where*) after the firſt &c. as it is ſaid; and have there the ſummoners &c.

*The writ of admeaſurement of paſture.*

THIS writ lies between commoners who have common *appendant* to their freeholds, if one of them ſurcharges the common, by putting in more cattle than he ought to have common for, there the party aggrieved ſhall have this writ.

When this writ iſſues at the inſtance of any particular commoner, all the commoners who have a right of common in ſuch place muſt be admeaſured, as well thoſe who have not ſurcharged the common as he who has ſurcharged the ſame; and on this writ he who brings the action muſt likewiſe be admeaſured.

This writ is *vicontiel*, and muſt be directed to the ſheriff; but ſhall not be returned. The form of writ is as follows.

*Form of the writ of admeaſurement of paſture.*

GEORGE the Third &c. To the ſheriff &c. *greeting: A.* has complained to us, that *C.* and *D.* have unjuſtly ſurcharged his common of paſture in *S.* ſo that they have in it more beaſts and cattle than

than they ought to have and belongs to them to have; and therefore WE command you, that juſtly and without delay, you admeaſure that paſture, ſo that the aforeſaid *C.* and *D.* may not have in it more beaſts and cattle than they ought to have and belongs to them to have, according to their freehold, which they have in the ſame town; and that the aforeſaid *A.* may have in that paſture ſo many beaſts and cattle as he ought to have and belongs to him to have, that we may hear no more clamour *&c.*

If the ſheriff on this writ ſhall not make the admeaſurement directed thereby, the party aggrieved ſhall have an *alias* and *pluries*, or the ſheriff ſhall, by returning the writ, ſignify the cauſe why he does not comply with the direction of the writ. If the ſheriff does not return the *pluries*, the party ſeeking redreſs under this writ may have an *attachment* againſt the ſheriff.

The plea may be removed out of the *county court* by a writ of *pone* at the ſuit of the plaintiff, without ſhewing any cauſe on ſuch writ for the removal; but if it is removed by the defendant, he muſt ſhew cauſe. The writ of *pone* for ſuch removal muſt be in the following form.

*Form of the writ of pone for the removal of a plea of admeaſurement of paſture out of the county court.*

*GEORGE* the Third *&c.* To the ſheriff *&c. greeting:* PUT at the petition of the plaintiff before our juſtices *&c.* ſuch a day the plea which is in your *county court*, by our writ between *A.* and *C.* and *D.* of *admeaſurement* of common of paſture in *S.* and ſummon *&c.* the aforeſaid *C.* and *D.* that they be then there to anſwer the aforeſaid *A.* thereupon *&c.* and have *&c.* this writ and the other writ.

On the writ of *admeaſurement* being brought, the plaintiff in the plaint ſhall enter the ſame in the *county court* before the ſheriff, in the ſame manner as on a *replevin* ſued by writ, on which the ſheriff ſhall make out a warrant againſt the defendant in the plaint to warn him to appear; and if he comes and pleads nothing in *bar*, or grants it, then the ſheriff muſt make the *admeaſurement* as directed by the writ.

If the defendant ſhews cauſe unto the ſheriff wherefore the *admeaſurement* ſhould not be made, then the ſheriff ought not to make the *admeaſurement* on this writ: but the plaintiff in the plaint ought to remove the ſame by writ of *pone* into the *C. B.* in which writ the defendant ſhall have a day to appear *&c.* and if he does not appear, then the plaintiff may ſue out a writ of *diſtringas* directed to the ſheriff to diſtrain the party, and ſuch a day ſhall be given by that writ, that two *county courts* may be kept between the date of the writ and the return; and in the *county courts* proclamation ſhall be made, that the defendant may come and ſhew cauſe why the *admeaſurement* ſhall not be made. If he does not come at the return of the *diſtringas*, then a writ may be awarded unto the ſheriff to make the *admeaſurement* by his default,

fault, which writ is given by the ſtatute of *Weſtminſter* 2. *cap.* 8. in the following form.

*Form of the writ of admeaſurement of paſture, by ſtatute of Weſtminſter* 2. *cap.* 8.

GEORGE the Third &c. To the ſheriff &c. *greeting:* WHEREAS *A.* has lately complained to us, that *C.* and *D.* have ſurcharged his common of paſture in *S.* ſo that they have more beaſts and cattle in it than they ought to have and belongs to them to have; *wherefore* WE command you, that juſtly and without delay you ſhould cauſe that paſture to be admeaſured, ſo that the aforeſaid *C.* and *D.* may not have in it more beaſts and cattle than they ought to have, and belongs to them to have, according to their freehold in the ſame town, and that the aforeſaid *A.* may have in that paſture ſo many beaſts and cattle as he ought to have and belongs to him to have, and that we may hear no more clamour &c. and you have done nothing thereupon, as we have received information from him the ſaid *A.* AND WHEREAS we have ordained in our writ of *admeaſurement* of paſture, that after the grand diſtreſs days ſhall be given, within which time two *county courts* may be holden, at which proclamation ſhall be made, that the defendant ſhall come in to anſwer the plaint, at which day, if he ſhall not come, *admeaſurement* may be made by default, WE command you, as we have heretofore commanded you, that juſtly and without delay, you cauſe the aforeſaid paſture to be admeaſured, according to the tenure of our other writ thereof to you directed, and according to the form of our ſtatute thereof provided and ſet forth, that we may not be again ſolicited on this matter by the aforeſaid *A.* Witneſs &c.

*Note*, When the plaint is removed by writ of *pone* into the *C. B.* and the plaintiff and defendant appear thereto, then the plaintiff ſhall declare againſt the defendant.

If the defendant does conſent to the writ of *admeaſurement*, then ſuch writ ſhall be made out directed to the ſheriff in the following form.

*Form of the writ of admeaſurement where the defendant conſents* &c.

GEORGE the Third &c. To the ſheriff &c. WE command you, that having taken with you twelve &c. by whom &c. who neither &c. you go in your own perſon to admeaſure the common of paſture, and by their oath you cauſe the common of paſture aforeſaid to be admeaſured, ſo that the aforeſaid *C.* and *D.* may not have more

than belongs to them to have, according to their freehold which they have in that town; and that the aforesaid *A.* may have in that pasture so many beasts and cattle as he ought to have, and belongs to him to have according to his freehold which he has in that town, and the *admeasurement* which *&c.* you make known before our justices under your seal, and the seals of those *&c.*

After this writ of *pone* has been returned to remove the plaint out of the *county court*, if the defendant makes default at the day of the returns of the writ, then shall issue a writ directed to the sheriff to distrain the defendant, and in such writ shall be contained, that the sheriff do make open proclamation in two *county courts &c.* that the defendant may come into the *C. B.* at the day of the return of the *distringas* to answer to the plaintiff *&c.* and if on this writ the sheriff return, that the writ is served, and the defendant does not come in, then a writ shall issue to the sheriff to make the *admeasurement*.

*Note*, If a person be once admeasured by a writ of *admeasurement* directed to the sheriff, by the sheriff *&c.* and afterwards such person surcharges the common again, then the party who sued out the first writ shall have a writ directed to the sheriff, called a writ *de secunda superoneratione*, in the following form.

*Form of the writ de secunda superoneratione.*

GEORGE the Third *&c.* To the sheriff *&c. greeting: A.* has shewn unto us, that WHEREAS he lately brought to you our writ of *admeasurement* of his common of pasture in *S.* which *C.* and *D.* had unjustly surcharged, and you did admeasure that pasture by our command, as the custom is in our realm *&c.* they the said *C.* and *D.* have unjustly surcharged that pasture after the aforesaid *admeasurement*, to the great expence and grievance of him the said *A.* and contrary to the form of the statute thereupon provided, and because we will relieve the said *A.* as we are bound to do, according to the form of the same statute, WE command you, that you go in your own person to that pasture, and diligently enquire, by the oath of honest and lawful men of your bailiwick, by whom the truth of the matter may be better known touching the second surcharge of the same pasture; and if you shall find by that inquest, that the pasture was again unjustly surcharged by the aforesaid *C.* and *D.* after the *admeasurement*, then that you answer to us at the *Exchequer* for the beasts beyond the due number put into the pasture after the first *admeasurement*, or for the price of them, and remove the surcharge aforesaid.

*Note*, A person may have a writ *de secunda superoneratione* on the first writ of *admeasurement* of pasture, when the writ is *vicontiel*, and directed

directed to the ſheriff; if the ſheriff makes *admeaſurement* on that writ, and afterwards the defendant ſurcharges the common again, as well as on the writ of *admeaſurement* awarded out of the *C. B.* on a judgment given there *&c.*

On the writ of *admeaſurement* awarded to the ſheriff, by which he makes *admeaſurement*, if the defendant ſurcharges the common afterwards, the writ of *de ſecunda ſuperoneratione* ſhall be awarded out of *Chancery.*

On a judgment in the *C. B.* of *admeaſurement &c.* if the defendant ſurcharges the common, the writ *de ſecunda ſuperoneratione* ſhall be awarded out of the *C. B.*

On this writ *de ſecunda ſuperoneratione* out of the *C. B.* the declaration or count ſhall be in the following form.

*Form of the declaration or count in* C. B. *on the writ de ſecunda ſuperoneratione for admeaſurement.*

*Middleſex*, to wit. *C.* and *D.* were attached to anſwer *A. &c.* and thereupon the aforeſaid *A.* complains, that WHEREAS he is ſeized of one meſſuage, with the appurtenances in *S.* to which he the ſaid *A.* has and ought to have common of paſture with four horſes, in ——— acres of paſture called *L.* every year throughout the whole year appurtenant, and the aforeſaid *C.* and *D.* as ſeized in their demeſne as of fee of four yards of land, with the appurtenances in the ſame town to which the ſaid *C.* and *D.* have and ought to have common of paſture with one hundred horſes, and twenty oxen *&c.* every year throughout the whole year appurtenant, the aforeſaid *C.* and *D.* have unjuſtly ſurcharged the common of paſture aforeſaid called *L.* ſo that they have more beaſts and cattle in it than they ought to have, and to them belong to have, whereupon the ſaid *A.* ſays he is injured, and has ſuſtained damage to the value of ——— ——— pounds, and prays an *admeaſurement &c.*

By the writ *de ſecunda ſuperoneratione* the plaintiff ſhall recover his damages againſt him that was defendant in the firſt writ, *And alſo* ſhall forfeit to the King the cattle which he puts in over the due number after ſuch *admeaſurement* made.

*Note*, By the writ of *admeaſurement* all the commoners ſhall be admeaſured, as well as thoſe who were parties to the writs. If any of thoſe who are commoners which were not parties to the writ of *admeaſurement &c.* do ſurcharge the common after *admeaſurement*, they ſhall not forfeit their cattle, nor the value of them that were in the paſture above the due number, becauſe they were not parties to the firſt writ; nor ſhall the party recover

recover damages againſt them for their default on this writ, for it lies only againſt him againſt whom the writ iſſued.

*The writ de curia claudenda for repairing of hedges &c.*

This writ lies againſt any perſon who ought to incloſe his land from his neighbour, and will not do it.

It may be ſued in the *county court* before the ſheriff in the following form.

*Form of the writ de curia claudenda in the county court.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* That you juſtice *C.* and *D.* that juſtly &c. they incloſe their land in *S.* which is open, to the nuiſance of the freehold of *A.* in the ſame town, which they ought and uſed to incloſe, as it is ſaid, and to which the ſaid *A.* can reaſonably ſhew they ought to incloſe, that we may have no more clamour for want of juſtice &c.

*Note,* This writ may be ſued in the *C. B.* and when it iſſues there, it muſt be in the following form.

*Form of the writ de curia claudenda in C. B.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *C.* and *D.* that juſtly &c. they incloſe their land in *S.* which is open to the nuiſance of the freehold of *A.* &c. which they ought and uſed to incloſe. And unleſs &c.

This writ may be removed out of the *county court* at the ſuit of the plaintiff, without any cauſe ſhewn; but if at the ſuit of the defendant, he muſt ſhew a cauſe for ſuch removal; and in that caſe, at the end of the writ, there muſt be the following clauſe:

" *Let execution of this writ be done, if the cauſe be true, otherwiſe* " *not.*"

*Note.* This writ will not lie but againſt the perſon who has a *freehold* in the land.

*The writ de rationabilibus diviſis.*

This writ is in its nature a writ of right, and lies where two perſons have lands in divers towns or hamlets, ſo that one is ſeized

of the land in one town or hamlet, and the other of the land in the other town or hamlet by himself, and they do not know the bounds of the towns or hamlets, which is the land of the one, and which is the land of the other, then to set the bounds in certain, this writ lies in the following form.

*Form of the writ de rationabilibus divisis.*

GEGORGE the Third &c. To the sheriff &c. *greeting:* WE command you, that justly, and without delay, you cause reasonable bounds to be set between the lands of *A.* of *C.* in the county of *S.* and the lands of *D.* of *K.* in *S.* as there ought and have been used to be, whereupon he the said *A.* complains, that the aforesaid *D.* draws more thereof to his fee than belongs to him to have &c. Witness &c.

This writ may be brought by a tenant in *fee-simple*, against a tenant for *life*, and the tenant for *life* shall have aid of the person in *reversion*, and the party may join the *mise* in this writ, which may be tried by the *grand assize*, as other writs of right are.

It is *vicontiel*, and to be determined before the sheriff; for the plaintiff in this writ shall make his *plaint* in the *county court* before the sheriff, in the nature of a *count*, on which the sheriff shall make a *precept* to warn the defendant; and when he appears, the plaintiff shall declare, and the defendant shall answer; but if he refuses so to do, then the sheriff shall make the division and partition of the land between the parties, by certain metes and bounds.

If the defendant pleads, and joins the *mise* on the mere right, and puts himself on the *grand assize*, then the plaintiff ought to remove the *plaint* by *writ of pone*, without cause shewn; but the defendant must remove the *plaint* with cause. The *count* or *declaration* on this writ, is in the following form.

*Form of the count or declaration on the writ de curia claudenda.*

AND the same *A.* now comes, and says, that *Whereas* reasonable and right bounds ought to be between the land of the aforesaid *N.* &c. in *S.* and the land of him the said *A.* in *B.* the bounds aforesaid, beginning towards the north in a certain place called *C.* and so directly towards, in length, by *L.* unto *E.* beyond which bounds the aforesaid *N.* &c. ought to have nothing towards the west, he the said *N.* &c. beyond the bounds aforesaid, hath drawn to his *fee* in *S.* of the land of him the said *A.* —— —— acres of moor and pasture &c. whereof he the said *A.* says, that one *W.* his late father, was seised of his demesne, as of fee by divers metes and bounds in time of peace in the time of &c. by taking the profits thereof to the value of —— —— pounds, and that such is his right he offers &c.

Divers

Divers tenants in common of a town or hamlet may have this writ againſt him who is tenant of another town adjoining, and they ſhall declare on one *count*, and ſhall make their ſeveral titles in that *count*, and ſhall alledge the *eſplees* ſeverally in the ſame *count*.

## *The writ ex parte talis.*

THIS writ lies where auditors are aſſigned unto a bailiff or receiver to account, and the auditors will not allow unto the bailiff or receiver his reaſonable allowance which they ought to do, but commit him to priſon, he who is ſo impriſoned ſhall have this writ.

If a man brings a *writ of account*, and auditors are aſſigned unto him who is bailiff or receiver to take his account, and they will not allow him his allowance as they ought to do, he may have this writ for relief.

If a plea of *account* be ſued in *London* againſt a receiver *&c.* or in any other court of record, and the party appears, and auditors are aſſigned him by the court, and they will not allow him ſuch allowances as he hath a right to, and ought to have, he ſhall have this writ in the following form.

## *Form of the writ ex parte talis, on ſtat. Weſtminſter* 2. *cap.* 11.

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* IT is ſhewn unto us on the behalf of *A.* (taken and detained in our priſon of *L.* for arrears of his account, in which *B.* affirms him to be bound to him for the time wherein he was bailiff in *N.*) that the auditors of the ſaid account deputed by him the ſaid *B.* for this purpoſe have unduly aggrieved him the ſaid *A.* on the ſame account, by charging him with the receipts which he hath not received, or by not allowing to him expences and diſcharges reaſonable, to the great damage and grievance of him the ſaid *A.* and becauſe we will not that the ſaid *A.* be injured in this behalf, WE command you, that if the aforeſaid *A.* by the teſtimony of the auditors of the accounts ſhall be delivered, and ſhall find you ſufficient bail to have him before our treaſurer and barons in our *Exchequer*, to render to the aforeſaid *B.* his account, according to the form of the ſtatute thereof provided by the common council of our realm then, that you cauſe him the ſaid *A.* to be delivered by the bail out of the priſon aforeſaid, if he be detained in the ſame on that occaſion, and no other, and give notice to the aforeſaid *B.* that he be then there with the rolls and tallies, by which the aforeſaid *A.* his account before rendered, to do and receive in the premiſes what of right, and according to the form of the ſtatute aforeſaid ought to be thereupon done; and have there the names of thoſe bail, and this writ. Witneſs *&c.*

If a perſon has auditors aſſigned him in *London* by the party who takes the account, and will not allow his tallies, or other things to be allowed, but commit him to priſon, becauſe he is a ſtranger in the city, and who cannot find ſureties to bail him to ſue his writ of *ex-parte talis &c.* he may ſend to the Chancellor, and ſurmiſe in the *Chancery*, and put in ſureties before the King there, and thereupon he ſhall have a writ directed to the ſheriff of *London* out of the court of *Chancery* rehearſing the matter, and how he has found ſureties there, according to the ſtatute commanding the ſheriff to deliver him out of priſon, and the writ ſhall be in the following form.

*Form of the writ ex parte talis, when to releaſe the party from priſon.*

*GEORGE* the Third *&c.* To the ſheriff *&c. greeting:* IT is ſhewn unto us on behalf of *A.* as in the foregoing writ, (until) to the great damage and grievance of him the ſaid *A.* and becauſe the ſame *A.* is a foreigner in our city of *London*, and unknown, wherefore he cannot find perſons of the ſaid city to be bail, to have him before our treaſurer and barons of the *Exchequer*, to render his account aforeſaid; and further, to do and receive that which our court ſhall conſider in the premiſes, and you have refuſed to admit other perſons bail for him the ſaid *A.* than of the city, and the ſame *A.* hath found ſufficient bail before us in our *Chancery*, to wit, *C. D.* and *E.* of *&c.* who have become bail before our treaſurer and barons of the *Exchequer* in *(the return of the writ)* to review there his ſaid account, and to ſtand to the right in the premiſes, according to the form of the ſtatute thereupon provided by the common council of our realm; WE command you, in the mean time, that you cauſe him the ſaid *A.* to be delivered by the bail aboveſaid out of the priſon aforeſaid, if he be detained in the ſame on that occaſion, and no other; and give notice to the ſaid *B.* that he be then there with the rolls and tallies, by which the aforeſaid *A.* his account before rendered as aforeſaid, and to do and receive what ſhall be juſt and reaſonable; and have there this writ *&c.*

If a perſon remains in priſon, committed by auditors, he may have the writ *ex parte talis*, returnable before the barons of the *Exchequer*, and thereupon he may have another writ out of *Chancery*, directed to the treaſurer and barons of the *Exchequer*, that they take ſureties of him who is in priſon according to form, and that they deliver him out of priſon, and he ſhall have another writ directed unto the *goaler*, that he ſend his body before the treaſurer and barons of the *Exchequer*, and that he deliver the body when the treaſurer and barons ſend him a writ ſo to do *&c.*

If a perſon be committed to priſon by auditors for arrearages of his account, and afterwards eſcapes out of priſon, the goaler ſhall ſatisfy the party at whoſe ſuit he was committed, and the goaler ſhall have a

ſpecial action *on the caſe* againſt the priſoner to anſwer the eſcape and damages which the goaler hath ſuſtained, or the goaler may take the party again.

*The recognizance in the county court before the ſheriff.*

IF a perſon doth acknowledge in the *county court* before the ſheriff to pay to another perſon a certain ſum of money at a day certain, and does not pay it at the day, then the recognizee ſhall have a writ out of the *Chancery* directed to the ſheriff, commanding him to do execution on that recognizance in this form.

*Form of the writ from the Chancery to the ſheriff to do execution, on a recognizance taken in the county court.*

GEORGE the Third &c. To the ſheriff &c. *greeting: A.* hath ſhewn unto us, that *Whereas* he impleaded *B.* in your county by our writ, and he the ſame *B.* in that full county, acknowledged himſelf to owe to the aforeſaid *A.* certain money, to be rendered at a certain time, you, notwithſtanding that time is paſt, have not yet cauſed the ſame money to be paid to him the ſaid *A.* on his complaint, according to his recognizance, to the great damage and grievance of him the ſaid *A.* and becauſe we are willing to relieve the ſame *A.* in this behalf, as it ſhall be juſt; WE command you, if it is ſo, that then you levy that money of the goods and chattels of him the ſaid *B.* in your bailiwick, and cauſe the ſaid *A.* to have the ſame without delay, that repeated clamour thereon may not come to us. Witneſs &c.

It is held, that a recognizance ſhall be made when a plea is depending in the *county court* before the ſhereiff *by writ* between the parties in debt &c. but if there be no plea depending in the *county court* by writ, but by plaint, it is doubted, though it is reaſonable to ſuppoſe, that it may be taken as well when the plea of *debt* is depending in the *county court* before the ſheriff by *plaint*, as if it were by the *King's writ*.

If a perſon comes into the *county court* before the ſheriff, and there in court acknowledges to pay a certain ſum of money unto another perſon at a certain day &c. where there is not any plaint or action depending between the parties, whether this acknowledgment is good or not has been doubted, though it is reaſonable to ſuppoſe, that if it be under the ſum of 40 *s.* that ſuch acknowledgment is good, and ſhall bind the party.

If a perſon has a writ directed to the ſheriff to do execution of ſuch recognizance, and the ſheriff ſhall not do the ſame, then the recognizee may ſue out an *alias*, *pluries*, and an *attachment* againſt the ſheriff. The *alias* is in the following form.

*Form of the alias from the Chancery to the ſheriff, to do execution on a recognizance taken in the county court.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE have received information on the behalf of *A.* that *Whereas* we lately commanded you, that if *B.* ſhould acknowledge himſelf to owe to *A.* (ſo much) then you ſhould diſtrain him the ſaid *B.* to render the ſaid debt to the ſame *A.* without delay, and although the ſaid *B.* hath before you acknowledged himſelf to owe to the aforeſaid *A.* the debt aforeſaid, yet you have hitherto delayed, and ſtill do delay to diſtrain him the ſaid *B.* to render that debt, to the great damage and grievance of him the ſaid *A.* and therefore we command you, if ſo it is, that you cauſe execution of the recognizance to be done without delay, according to the tenor of our command aforeſaid, and that you in no wiſe omit this. Witneſs &c.

If the recognizor will not again acknowledge the debt before the ſheriff when he comes to determine &c. but ſays, that he has paid the ſame, then the ſheriff ought not to do execution.

*Note*, There is another writ in the regiſter on this occaſion in the following form.

*Form of the writ on a recognizance in the county court, where the party acknowledges the debt.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE command you, that if *A.* hath acknowledged himſelf to owe to *B.* 10 *l.* then diſtrain him the ſaid *A.* to render the debt aforeſaid to him the ſaid *B.* &c.

The party may have on this writ, an *alias*, *pluries*, and *attachment*, and the ſheriff may return on the *alias*, *That he hath diſtrained the party by corn, or other chattels, for which he hath not found buyers.*

If a perſon be in execution on a *ſtatute merchant*, he ought to be found in priſon for the rent and revenues of his lands which are in execution &c. that is to ſay, with bread and water, as appears by the ſtatute, and if he has not the ſame, he may ſue out a writ on the *ſtatute* directed to the mayor and ſheriff of the goal where he is impriſoned, that he may have the livelihood which the law gives him, and the writ muſt be in the following form.

Form

*Form of the writ to procure a priſoner the goal allowance, when in execution on a ſtatute merchant.*

GEORGE the Third &c. To the mayor and ſheriffs of *London*, *greeting:* WHEREAS it is contained in the ſtatute ſet forth of merchants, that merchants, for whoſe debts it ſhall happen that their debtors are arreſted and impriſoned, according to the form of the ſtatute aforeſaid, are bound to find for thoſe debtors remaining in priſon bread and water for their ſubſiſtance; WE command you, that you cauſe to be done in this caſe to *W.* of *S.* arreſted and detained in our priſon for a debt to *E.* of *R.* by form of our ſtatute aforeſaid, as it is ſaid, if he be detained in the ſame, on that, and no other occaſion, that which ought to be done, and in the like caſe has been uſed to be done, according to the form of the ſtatute aforeſaid. Witneſs &c.

*Note*, On this writ the party may have an *alias*, *pluries*, and *attachment*.

*The writ de meſne.*

THIS writ lies where there is lord *meſne* and tenant, and each hold by *owelty* of ſervices, as by homage, fealty, and 20 *l.* rent yearly. If the tenant be diſtrained by the *lord paramount* for the rent or ſervice of the *meſne* behind, he may have a *writ of meſne* againſt the lord who is *meſne*, and by ſuch writ he ſhall recover his damages, if he be diſtrained, otherwiſe not; and by the writ he ſhall be compelled to do the ſervice, and to pay the rents, and the writ may be ſued in the *county court* before the ſheriff in the following form.

*Form of the writ de meſne before the ſheriff in the county court.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE command you, that you juſtice *A.* that juſtly &c. he acquit *B.* of the ſervices which *C.* requires from him for his freehold which he holds of the aforeſaid *A.* and whereof he complains that he is diſtrained for his default, as he can reaſonably ſhew that he ought to acquit him, that we may hear no more clamour &c.

*Note*, If this writ be ſued out in the *C. B.* it muſt be made in the following form,

*Form*

*Form of the writ de meſne, when in the C. B.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *A.* that juſtly &c. he acquit *B.* of the ſervice which he requires from him for his freehold &c. whereof he the ſaid *A.* who is the *meſne* between us, and the aforeſaid *B.* ought to acquit him, and whereof he complains that for his default he is diſtrained, and unleſs &c.

*Note,* The foregoing writ is uſed where the King diſtrains for ſervice &c.

And *note,* If any other perſon be *lord paramount,* then the foregoing writ muſt be in the following form.

" That he acquit *B.* &c. which *C.* requires of him for his free-
" hold &c. whereof he the ſaid *A.* who is the *meſne* between *C.* and
" the aforeſaid *B.* ought to acquit him &c."

This writ, when ſued out, if it is removed out of the *county court,* at the ſuit of the plaintiff, by *writ of pone,* it is without cauſe ſhewn; but if at the ſuit of the defendant, he muſt ſhew cauſe for ſuch removal.

A perſon may have an acquittal, and ſue forth a *writ of meſne* thereon different ways: For example,

If the *meſne* grant unto his tenant by his deed on his tenure made to acquit him againſt his *lord paramount,* he may have a *writ of meſne* on that grant.

The ſame where he holds in *frank almoigne.*

The ſame where he holds in *frank marriage*; or,

Where he holds by the like ſervice as the *meſne* holds over, which is called *owelty.*

*And alſo,* a perſon may have an acquittal by *preſcription,* in the ſame manner as if he holds by *homage auncеſtrel.*

*And alſo* by *conuzance* in a *court of record* for to acquit him &c.

If a perſon brings a *writ of meſne* where he is not diſtrained, yet ſuch writ may be maintained, but the party ſhall not recover damages, for the ſame is only brought to recover the acquittal &c. As for example,

Where a perſon brings a *writ of warranty* of *charters,* when he is impleaded &c. there he is to recover the warranty *for place and time.*

If a tenant holds by the ſervices which the *meſne* holds over; *And alſo* by other ſervices, it is a good *owelty* to have acquittal, becauſe it is ſuch, and no more; and although the lord dies pending the *writ of meſne,* yet ſuch writ ſhall not abate.

A tenant for a term of life, where the remainder over is in fee ſhall have a *writ of meſne* againſt the *meſne*; but the tenant for life ſhall not have this writ againſt the perſon who is entitled to the reverſion

A tenant in *dower* ſhall have a *writ of meſne* againſt the perſon who is entitled to the reverſion, becauſe he has her ſtate by the *common law.*

If the *meſne* has paid the ſervices due unto the *lord paramount*, and the tenant is afterwards diſtrained by the lord for ſuch ſervices, he ſhall be entitled to a *writ of meſne.*

A huſband and wife ſhall have a *writ of meſne* where they are diſtrained for the lands belonging to the wife.

If the *meſne* grant the *meſnalty* for life, and the tenant attorn, the tenant ſhall not have a *writ of meſne* againſt the grantee for life; but the tenant in tail ſhall have this writ, and the plea of *antient demeſne* is a good plea to this writ.

This writ lies againſt a tenant for life, where the remainder over is in fee, and the writ may be maintained againſt an heir of the *meſne* where his anceſtors have granted the ſervices of the tenant by *fine*, if ſuch tenant has not attorned according to the *fine*, for he ſhall not be compelled to attorn without granting an acquittal unto him; and if he grant ſuch acquittal, he ſhall have this writ on the grant.

If a man be tenant by the *courteſy* of a *meſnalty*, *&c.* if the tenant be diſtrained, the writ of *meſne* ſhall be ſued againſt him, in reverſion, and not againſt the tenant by the *courteſy.*

By *ſtat. Weſtm. 2. cap.* 9. If a man have judgment to recover his acquittal in a writ of *meſne*, if he be not afterwards accquitted, he ſhall have on the recovery a *diſtringas ad acquietandum* againſt the *meſne*, if it be *ten years* after ſuch judgment given.

If the *meſne* do acknowledge acquittal by *fine*, and afterwards ſues out a *ſcire facias* thereon, and the party does not appear at the return of the writ, then the party ſuing the firſt writ, may iſſue out a writ of *diſtringas ad acquietandum*, *&c.* and on failure thereof, an *alias* & *pluries*, *&c.* until the party appears, and if he comes in, on the *diſtringas*, and cannot plead any thing but that he ought to acquit the plaintiff, he ſhall recover damages againſt him.

If a perſon recover an acquittal on a *writ of meſne*, he ſhall afterwards have a *diſtringas ad acquietandum*, and if he does not appear, he ſhall be *forejudged* by default of his *meſnalty*, and the ſame, if it be found againſt him by verdict.

A perſon may have a *writ of meſne* to acquit him of a ſuit in a *hundred court*, which the *meſne* ought to do by reaſon of his *meſnalty*, and not by reaſon of *reſiancy*, &c.

The proceſs on a *writ of meſne* is, *ſummons*, *attachment*, and *diſtringas*. If the defendant has not any thing in the county by which he can be diſtrained, the plaintiff may ſurmiſe that he has aſſetts in another county, and pray a *diſtringas* thither, and he ſhall have it on the ſtatute, and on that he ſhall be *forejudged*, &c. if he do not appear, and the writ be ſerved and returned againſt him.

This remedy is given by the *ſtatute of Weſtm.* for at *common law* he can have no more than a *diſtreſs infinite* in the ſame county where the writ was brought, and that muſt be in the county where the lands lie.

The plaintiff may chuſe whether he will ſue the proceſs at *common law*, *diſtreſs infinite* in the county, or the proceſs which is given by the *ſtatute of Weſtm. viz. ſummons*, *attachment*, and the *grand diſtreſs*, on which the defendant ſhall have a day to anſwer by ſuch times as two *county courts* may be holden, in which the ſheriff ſhall make proclamation that the defendant ſhall come in to anſwer the plaintiff: And if on ſuch proclamation he does not come in and anſwer, and the writ be returned, he ſhall be *forejudged*.

## *The writ de plegiis acquietandis.*

This writ lies where a perſon becomes pledge or ſurety for another, to pay a certain ſum of money at a certain day, &c. if the party does not pay it at the day, &c. If the party who becomes ſurety be compelled to pay money, he ſhall have this writ againſt the perſon for whom he or they were ſurety, and who was to have paid the money.

This writ is *vicontiel*, and may be ſued in the *county court* before the ſheriff, or in the *Common Pleas* by *precipe*. When by *precipe* in the *Common Pleas*, it is in the following form:

## *Form of the precipe in the C. B.*

GEORGE the Third &c. To the ſheriff *S. greeting:* WE command you, that you juſtice *A.* that juſtly &c. he acquit *B.* of ——— pounds, whereof he hath put himſelf in pledge againſt *C.* and has not yet acquitted him, as it is ſaid, as he can reaſonably ſhew that he ought to acquit him thereof, that we may hear no more clamour thereon for want of juſtice, &c.

*Another*

*Another form of a precipe in C. B.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *A.* that juſtly, &c. he acquit *B.* of ——— pounds, whereof he hath put himſelf in pledge againſt *C.* and has not yet acquitted him, as it is ſaid &c. and unleſs &c.

If brought againſt executors, the *precipe* of the *Common Pleas* muſt be in the following form:

*Form of the precipe in the C. B. when brought againſt executors.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *A.* and *B.* executors of the laſt will and teſtament of *D.* deceaſed, that juſtly &c. they acquit *E.* of &c. whereof he the ſaid *E.* has put himſelf in pledge againſt *D.* and has not yet acquitted him &c.

*Note,* If a perſon become ſurety for another, to pay a certain ſum of money, or to do any other thing &c. ſo long as the principal debtor has any thing and is ſufficient, his ſureties ſhall not be diſtrained by the ſtatute of *Magna Charta.* If they be diſtrained by the ſheriff &c. they ſhall have a ſpecial writ on the ſtatute for to diſcharge them in the following form:

*Form of the writ to the ſheriff on the ſtatute of Magna Charta to releaſe the ſureties when diſtrained.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* *A.* and *B.* have ſhewn to us, That *Whereas* they became pledges for *C.* and *D.* for a certain ſum of money, in which he the ſaid *C.* was bound to the aforeſaid *D.* and the ſaid *C.* has ſufficient whereof he can pay the debtor aforeſaid; *Nevertheleſs* you have diſtrained them the ſaid *A.* and *B.* to pay the ſaid debt to the aforeſaid *D.* And becauſe it is unjuſt that any pledges be compelled to the payment of a debt ſo long as the principal debtors have ſufficient whereof they can render the debt, WE command you that you diſtrain *C.* to pay the ſaid money, and that you thereupon permit his pledges to have peace, and that you cauſe their beaſts to be delivered without delay, if you have taken any on that occaſion. WITNESS &c.

*Note,* The proceſs on this writ is *ſummons, attachment,* and *diſtreſs,* &c.

## *The writ of detinue.*

THIS writ lies where a perſon delivers goods or chattels unto another perſon to keep, and afterwards ſuch perſon will not deliver them back.

It may be brought by a perſon who delivers goods or money put up in bags, in a cheſt, or in a cupboard to another perſon to keep, and he will not deliver ſuch goods, *&c.*

If a perſon delivers money, not in a bag or cheſts, to be redelivered back to another, or to be delivered over to a ſtranger, the perſon to whom ſuch money was to be delivered ſhall not have an action of *detinue* for the money, but a *writ of account*, becauſe *detinue* muſt be of a thing which is certain, as of money in bags, or of a horſe, or of a number of cows, or any other thing that is certain.

The *writ of detinue* may be *vicontiel*, and proſecuted before the ſheriff in his *county court*, at the election of the plaintiff, or it may be brought in the *Common Pleas*. If brought in the *Common Pleas* it is in the following form:

## *Form of the writ of detinue when brought in the C. B.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* COMMAND *A. &c.* that *&c.* he render to *B.* one charter, which he unjuſtly detains from him, as he ſays, and unleſs *&c.*

Or thus;

That he render to *B.* one box with *three* writings obligatory, ſigned under the ſeal of the aforeſaid *B.* contained in the ſame box.

*Note*, A perſon may have a *writ of detinue* of *one* writing in the following form;

## *Form of the writ of detinue in the C. B. when for one writing.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* COMMAND *A.* that *&c.* he render to *B.* a certain writing, by which *B.* has given and granted all his goods and chattels lately being in the manor of *H.* to *I.* of *L.* which he unjuſtly detains from him *&c.*

Note,

*Note*, If this writ is brought in the *county court* before the ſheriff, it is in the following form:

*Form of the writ of detinue when brought in the county court before the ſheriff.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WE command you, that you Juſtice *A.* that juſtly &c. he render to *B.* one charter, *or* three charters, or one writing &c. which he unjuſtly detains from him, as he ſays, and as he can reaſonably ſhew that he ought to render the ſame to him, that we may hear no more clamour, &c.

*Note*, If a perſon ſues in any court a *writ of detinue* for any charters which touch or concern *freehold*, if the ſame be not proſecuted in the *C. B.* by the King's writ, the defendant in ſuch ſuit may ſue out a *writ of prohibition*, to prohibit them from proſecuting ſuch ſuit &c. and to ſurceaſe &c.

*Form of the writ of prohibition, to ſtay the ſuit where it is proſecuted in a court which is not of record.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WHEREAS pleas of *detinue* of charters and writings, touching freehold, ought not to be pleaded without our writ in any courts which have no record, according to the law and cuſtom of our realm, and *W.* without our writ, has impleaded *B.* before you in the court of our Lord aforeſaid, of *K.* that, "That he the ſaid *B.* render to the aforeſaid *W. three charters*," as we have received information. WE command you, if it be ſo, that then you do abſolutely ſupercede that plea from being further holden before you in the court aforeſaid, without our writ, and that you tell the aforeſaid *W.* in our behalf, that he may obtain for himſelf our *writ of detinue* of the charters aforeſaid, againſt the ſaid *B.* if it ſhall ſeem to him expedient. WITNESS &c.

The plea may be removed by *writ of pone* out of the *county court* at the plaintiff's ſuit, without cauſe ſhewn in the writ for ſuch removal; but if the ſame is removed at the ſuit of the defendant, he muſt ſhew cauſe in the writ, at the end thereof, in the following manner:

*Let execution of this writ be done, if the cauſe be true, otherwiſe not, &c.*

If

If a perſon find goods belonging to another, the perſon who loſt the ſame, may have a *writ of detinue* againſt the finder for the goods ſo loſt.

If a perſon gives land *in tail*, by deed indented, and the donee dies without heirs, the donor ſhall have this writ for that part of the deed indented which the donee had.

If lands be given to two perſons, and the heirs of one of them, if the tenant for life dies, the perſon who has the fee ſhall have a *writ of detinue* for that deed.

If a perſon makes a feoffment in *fee* of his lands by deed, yet the feoffee ſhall not have the charters concerning the lands, but the feoffor ſhall keep them, but againſt a ſtranger the feoffee ſhall have an action of *detinue* for thoſe charters which concern the lands, if he cannot make title by the feoffor, or by thoſe who claim under the feoffor.

The heir *in tail* ſhall have a *writ of detinue* againſt the *diſcontinuee* for the deed of entail by which ſuch lands were given.

If a perſon makes a feoffment *in fee* of the lands which is his *fee-ſimple*, his heirs ſhall have the charters which relate to the ſame lands, and not the executors of the father.

If a perſon makes a leaſe for a term of years, and aftewards confirms his eſtate *in fee*, the heir of the feoffee ſhall have the deed of the leſſor for years, as well as the deed of confirmation, becauſe that deed doth make the confirmation good, and ſo he ſhall of every deed which makes his title as a releaſe, *&c.* and on refuſal he may bring his action of *detinue* for the recovery of the ſame.

The heir ſhall have a *writ of detinue* of charters, although he has not the lands; for example, If a perſon be enfeoffed with warranty and enfeoffs another with a warranty *in fee*, his heir ſhall have a *writ of detinue* of that deed by which he was enfeoffed, becauſe he may take advantage of the warranty.

If the father be diſſeized and dies, his ſon may have a *writ of detinue* for the charters, although he was not poſſeſſed of the land, and the executors cannot have ſuch writ.

If a perſon have goods delivered to him to be delivered over to another, and afterwards a *writ of detinue* is brought againſt him by the perſon who has a right to the goods. If the defendant, pleading the ſuit, delivers the goods to the perſon to whom of right they belong, ſuch delivery may be pleaded, and is a good *bar* to the action, becauſe

cauſe he has then delivered them according to the *bailment* made unto him.

After a divorce made between huſband and wife, the wife may have a *writ of detinue* for the goods given her in *frank-marriage*.

*Note*, The proceſs on the *writ of detinue*, in order to bring the ſame to judgment and execution, is *ſummons*, *attachment*, and *diſtreſs*.

## *The writ of admeaſurement of dower.*

THIS writ is *vicontiel*, and ſhall be ſued in the *county court* before the ſheriff. It lies where the heir when he is within age endows the wife of more than ſhe ought to have dower of; or if the guardian of the heir endow the wife of more than of the third part of the land of which ſhe ought to have dower. The heir, when at full age, may ſue this writ againſt the wife, and thereby ſhe ſhall be admeaſured, and the ſurpluſage which ſhe had in dower ſhall be reſtored to the heir. In which caſe there ſhall not be aſſigned anew any land *To hold* in dower, but he muſt take from her ſo much of the land as amounts to above a *third* part of which ſhe ought to be endowed.

By *ſtat. Weſtm. 2. cap. 7.* If the heir within age, before the guardian enters into the land, *doth* aſſign to the wife more land in dower than ſhe ought to have, the guardian may have a *writ of admeaſurement* againſt the ſheriffs.

If the guardian brings the writ, and does purſue it againſt the wife, yet the heir, when at full age, by this ſtatute ſhall have a *writ of admeaſurement of dower* againſt the wife, and when brought in the *county court* before the ſheriff, it is in the following form:

## *Form of the writ of admeaſurement of dower in the county court.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting: A.* the ſon and heir of *B.* has complained to us, that *C.* who was the wife of the aforeſaid *B.* has for dower more of the freehold which was the aforeſaid *B.*'s, ſome time her huſband, in *N.* than ſhe ought to have, and than belongs to her to have; And therefore WE command you, that juſtly, and without delay, you cauſe that dower to be admeaſured, ſo that the aforeſaid *C.* may not have more for dower of the inheritance of the aforeſaid *A.* than ſhe ought to have, and than belongs to her to have, according to her reaſonable dower:

And let the aforesaid *A.* have of that dower that which he ought to have, and belongs to him to have, that we may hear no more clamour *&c.* WITNESS *&c.*

*Note*, If this writ is brought by the guardian it is in the following form:

*Form of the writ of admeasurement of dower when brought by the guardian of the heir.*

GEORGE the Third *&c.* To the sheriff *&c. greeting: A.* the guardian of the land, and heir of *E.* has more for her dower *&c. (as in the former writ to the word* until,) so that the aforesaid *C.* may not have more in dower of the inheritance of the aforesaid heir than she ought to have *&c.* and that the aforesaid guardian may have of that dower *&c.* that we may hear no more clamour *&c.*

*Note*, If the plea is in the *county court* before the sheriff, the plaintiff may remove it without a cause shewn in the writ, but if the defendant wants to remove the same, he must in the writ shew cause for so doing.

If this writ be removed into the *C. B.* by *writ of pone*, and process be awarded against the defendant, according to the statute: Which process is *summons*, *attachment*, and *distress*, *&c.* in that case the sheriff cannot make the admeasurement but to extend to all the land particularly, and to return the same into the *C. B.* and thereon the admeasurement shall be made by the justices.

If the guardian assign for dower *&c.* more than the wife ought to have, and afterwards grants over his estate, his assignee shall not have this writ.

If the heir within age assigns unto his wife more in dower than she ought to have *&c.* the guardian in *right* may have a *writ of admeasurement*; but if he grants over his estate, his assignee, who is guardian *in tail*, shall not have such writ, because it was a thing in action given to his lessor, *&c.* and the heir shall have a *writ of admeasurement of dower*, for dower assigned in the time of his ancestor.

If a woman be endowed in *Chancery*, the heir shall have a *writ of admeasurement of dower* against his wife if she have more assigned to her for her dower than she ought for to have.

If the guardian do assign her dower more than she ought to have, the heir, during his *nonage*, cannot have this writ; but if he himself assign such dower, then he may, during his *nonage*, have a *writ of admeasurement of dower*, in order to set such matter right.

But

But if the wife after the aſſignment of *dower* does improve the land and thereby makes it more valuable than it was at the time of the aſſignment. A writ of admeaſurement will not lie on ſuch improvement.

By *ſtat.* 7 *Edw.* 3. *cap.* 66. 31*ſt. Edw.* 3. *cap.* 31. & 3 *Hen.* 7. *cap.* 103. If the anceſtor died ſeized and the huſband died before he entered into the land yet notwithſtanding the wife ſhall be endowed tho' the huſband had but a poſſeſſion in *law.*

A man ſhall not be tenant by the *courteſy* of his wife's lands, if ſhe had not poſſeſſion in *deed,* unleſs in ſpecial caſes, for example of an advowſon or rent, where the wife dies before the payment of ſuch rent.

In that caſe, if the King's tenant dies ſeized, and the heir dies before he enters, then the wife ſhall be endowed.

Where a woman takes a leaſe for a term of years of lands, ſhe ſhall not be endowed of the ſame lands, during the term.

Where the eſtate which the huſband has during the marriage, is determined, in that caſe the wife ſhall looſe her *dower*; for example, if a tenant in tail does diſcontinue in fee and afterwards takes a wife, and diſſeiſes the diſcontinuee or the diſcontinuee doth enfeoff him, and afterwards the tenant in tail dies ſeiſed, his heir is remitted and the wife ſhall loſe her power, becauſe the heir is in on another eſtate of inheritance than the huſband had during the coverture.

By *ſtat.* 16 *Edw.* 3. *cap.* 21. If a man has a right of action to recover any land, and afterwards he enters and diſſeiſes the tenant of the land, and dies ſeiſed, and his heir enters, the heir is remitted unto the title which his anceſtor had, and the huſband's wife ſhall looſe her *dower,* for that eſtate which the huſband had is determined, becauſe it was an eſtate in fee *by wrong,* and the heir has the eſtate in fee, which his anceſtor had *by right.*

If the huſband be *tenant in common* with two others, in fee of certain lands, and dies, his wife ſhall be endowed of the *third* part of that land only, with metes and bounds to hold in *common.*

A woman at the age of *nine years* or more, at the death of her huſband ſhall have *aower* of his land, but if ſhe is under that age, ſhe ſhall not have *dower.*

A wife ſhall not be diſtrained in the lands which ſhe holds in *dower* for the debts of the huſband in his life time, due to the King. Nor in the lands of inheritance of his wife, nor in the lands which ſhe

has by purchaſe made by the huſband to him and his wife, and unto their heirs; and if ſhe be diſtrained, ſhe may ſue forth a writ in the following form:

*Form of the writ where the wife is diſtrained for the debts of her huſband, in lands in which ſhe is endowed.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* WHEREAS according to the laws and cuſtoms of our realm of *England*, women ought not to be diſtrained to pay the debts of their huſbands, in the lands and tenements which they hold in *dower* of the gift of their huſbands, or which are of their own inheritance or which they have purchaſed to themſelves; and you have diſtrained *B.* who was the wife of *A.* in her lands and tenements which are holden in *dower* of the gift of the aforeſaid *A.* and which were alſo of the inheritance of her the ſaid *B.* as we have received information from her complaint. WE command you, that you do not cauſe her the ſaid *B.* to be diſtrained in her lands and tenements which are holden in *dower*, or which are of her own proper inheritance or of the purchaſe of her the ſaid *B.* to pay the debt of the ſaid *A.* ſome time her huſband, againſt the laws and cuſtoms aforeſaid, and the diſtreſs which &c. cauſe to be delivered to her, &c. WITNESS &c.

There is another writ in the *regiſter* on this ground, directed to the ſheriff, that he do not diſtrain the wife who holds lands in *dower*, for the debts of the huſband which he owed to the King before the marriage nor the lands which the huſband and wife purchaſed jointly in fee, for the huſband's debts, which he became debtor for, before ſuch purchaſe.

The wife may have this writ out of the *Chancery* directed to the *treaſurer* and *barons of exchequer*, commanding them that they inquire thereof; and if they find the ſame, they may diſcharge the wife. In which writ is contained the following *proviſoe.*

PROVIDED *that thoſe debts be levied on the executors and heirs of the aforeſaid* A. *and on the tenants of the lands which were his and which of right ought to be charged therewith, as is juſt*, WITNESS &c.

*The writ de conſuetudinibus et ſervitiis.*

IT is a writ of cuſtoms and ſervices, and in its effect is in nature of a writ *of right.* It lies for the Lord who has a *fee* in the *ſeigniory*, *And alſo* for a tenant in tail of the *ſeigniory* or for a tenant in *dower*, or for life or for him that has a leſs eſtate than a fee, and the writ is *cloſe* and not PATENT, and is directed to the ſheriff, and is

return-

returnable. It may be brought in the *common pleas* or in the *county court* before the ſheriff, at the election of the perſon who ſues out the ſame.

This writ may be brought where a tenant does deforce the Lord of the ſervice which he ought to have; when brought in the *common pleas* it is in the following form.

*Form of the writ de conſuetudinibus et ſervitiis in the common pleas.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* COMMAND *A.* that &c. he do to *B.* the cuſtoms and ſervices which he ought to do to him for his freehold which he holds of him in *G.* as in rents, arrearages, and other things.

Or thus:

In homage, reliefs, and other things.

Or thus:

In ſuits of court, and other things, and unleſs &c.

*Note*, If this writ is proſecuted in the *county court* before the ſheriff, then it is in the following form.

*Form of the writ de conſuetudinibus et ſervitiis when ſued by juſticies in the county court before the ſheriff.*

GEORGE the Third &c. To the ſheriff &c. *greeting:* JUSTICE *A.* that &c. he do to *B.* the cuſtoms and right ſervices, &c, [*as in the foregoing writ*] as he can reaſonably ſhew that, &c. that we may hear no more clamour, &c.

*Note*, A perſon may ſue ſeveral tenants by one writ of cuſtoms and ſervices, by ſeveral *præcipes* in the *common pleas*, or by one writ and divers *juſticies* in the writ, which are to be directed to the ſheriff to hold plea on them.

If the writ of cuſtoms and ſervices be ſued againſt ſeveral tenants by ſeveral *præcipes* in the writ and returned into the *common pleas*, then ſuch *præcipes* are to be in the following form:

COMMAND *A. that &c. he do to* B. &c. *and command* C. *that &c. he do to* D. &c. *and command* F. *that &c. he do to* G. &c.

*Note*, In the laſt *præcipe* muſt be inſerted this clauſe.

*In rents and other things* the word *arrears* muſt be omitted.

A writ of cuſtoms and ſervices does not lie againſt a tenant in *frank-marriage*, until the fourth degree be paſt, *&c.* If not that he has *homage* to the lord, *&c.* for by ſo doing he is concluded, *&c.*

If a perſon will bring a writ of cuſtoms and ſervices againſt any tenant, and by his *count* demands *homage* then the writ ought to make ſpecial mention thereof, to wit, *as in homage*, *&c.* otherwiſe the writ ſhall abate.

This writ is a *præcipe* that he make, *&c.* and where the perſon demands lands, then the writ is *a præcipe that he reſtore*, *&c.*

## *The writ of annuity.*

THIS writ lies where a man grants to another a yearly rent for life, or for years, or in fee out of his lands, or to be paid by him yearly at a certain day; In this caſe the grantee may ſue out *a writ of annuity* for the ſame, if the party has omitted to pay the annuity at the day.

If the grant be out of lands, with a clauſe of diſtreſs, he may elect either to diſtrain for the arrears and make it a rent charge, or he may bring a *writ of annuity*. If he brings a *writ of annuity*, and the defendant appears, and the plaintiff declares thereon, then he cannot diſtrain for it afterwards; and in like manner if he does diſtrain for it and avow, then he ſhall not ſue out a *writ of annuity* for the ſame rent.

If a perſon grants to another a yearly rent for life, for years, or in fee, and does not expreſs in ſuch grant that the ſame ſhall be taken out of any lands or tenements, nor any diſtreſs granted for non payment thereof, then it is merely conſidered as an annuity, and he ſhall have no other remedy but a *writ of annuity*.

This writ may be ſued in the *county court* before the ſheriff by *writ of juſticies* or by *præcipe* in the *common pleas*. If by *writ of juſticies* in the *county court*, the writ is in the following form.

### *Form of the writ of annuity in the county court before the ſheriff.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* WE command you that you juſtice *A.* that juſtly *&c.* he renders to *B.* 100 *merks*, 10 *quarters of wheat* and 20 *robes*, which are in arrear to him,

him, of the yearly rent of 100*s.* *two quarters of wheat* and *one robe* which he owes him as he ſays, as he can reaſonably ſhew that he ought to render to him, that we may hear no more clamour, *&c.*

If this *writ of annuity* is ſued in the *common pleas* by *præcipe* it is in the following form:

*Form of the writ of annuity in the common pleas by præcipe.*

COMMAND *A.* that juſtly *&c.* he renders to *B. one hundred merks* and the moiety of *three garments*, with coſtly fur, and of *two garments* with fine linnen which are in arrear to him, of the yearly rent of *ten merks*, and a moiety of *one garment* with fur, and of *one garment* with fine linnen, which he owes to him, *&c.* and unleſs *&c.*

In *debt* if a perſon demand money, *And alſo ten quarters of wheat*, the form of the writ in the *common pleas* muſt be thus:

COMMAND *A.* that juſtly *&c.* he renders to *B. ten pounds &c.* which he owes him, and *ten quarters of wheat* which he unjuſtly detains from him, *&c.*

The *writ of annuity* ought to be brought in the county where the grant was made; but an annuity to receive from a particular perſon, a body corporate, or from a church, ought to be brought where the church or houſe, or where the ſeiſin is alledged.

A *writ of annuity* may be maintained againſt a parſon, on a grant made by his predeceſſor, with the aſſent of the patron and Ordinary.

An annuity granted by the biſhop, with the confirmation of the dean and chapter, ſhall bind the biſhop.

If the King grant a perſon an annuity for life, or years, he ought to expreſs in the grant by whoſe hands he ſhall receive the annuity, for example, *By the hands of the ſheriffs aforeſaid, or of our bailiffs of our manor* of *R.*; and then the bailiff or ſheriff, ſhall have an allowance on his patent, if he has paid the ſame. If the foregoing words are not in the grant of the annuity, the ſame is void, becauſe he cannot ſue the King for the ſame, and no perſon is bound to pay the ſame to him, if the perſon is not expreſſed and named in the patent, *&c.*

The proceſs on the *writ of annuity* is *ſummons*, *attachment*, and *diſtreſs*, and by *ſtat.* 23. *Hen.* 8. *cap.* 14. for default of diſtreſs, *&c.* proceſs of *outlawry*.

The

*The writ de attornato faciendo vel recipiendo.*

THIS writ lies where a man ought to do ſuit at the *county court*, or at the *hundred* or *wapentake* or other court, and he would make an attorney for him to appear at the ſame court.

If the ſheriff ſhould refuſe to admit ſuch attorney ſo appointed, by the party aforeſaid, he may ſue out the writ *de attornato faciendo vel recipiendo* directed to the ſheriff or bailiff of the hundred, commanding them to receive ſuch perſon to be attorney for him to appear, *&c.* and the ſaid writ is in the following form:

*Form of the writ de attornato faciendo vel recipiendo, when directed to the ſheriff.*

GEORGE the Third *&c.* To the ſheriff *&c. greeting:* BECAUSE it is provided by the common council of our realm, that every freeman who owes ſuit at the *county court*, *tithing*, *hundred* and *wapentake*, may freely make his attorney to do his ſuit for him. We command you, that the attorney whom *S.* ſhall make in his ſtead, to do his ſuit for him at your *county court*, your *tithing* of *A.* and *B.* your *hundred* of *C.* and *D.* your *wapentake* of *E.* and *F.* you receive in the place of the ſaid *S.* for this purpoſe, without difficulty. WITNESS *&c.*

If to the bailiff of a *hundred*, the writ muſt be in the following form:

*Form of the writ de attornato faciendo vel recipiendo, when directed to a bailiff of a hundred.*

GEORGE the Third *&c.* To the bailiff of our hundred of ſeven hundreds of *Cobham* and *Bray*, *greeting:* BECAUSE it is provided by the common council of our realm, *&c.* who owes ſuit to the hundred may freely, *&c.* WE command you, that the attorney, *&c.* at the aforeſaid hundred of ſeven hundreds of *Cobham* and *Bray*, you may receive in his ſtead, *&c.*

If directed to the baliff of another lord, the writ muſt be in the following form:

Form

*Form of the writ de attornato faciendo vel recipiendo, when directed to the bailiff of another lord.*

GEORGE the Third &c. To the bailiff of *A.* of *J. greeting:* WHEREAS by the common council, &c. who owes ſuit to the court of the ſaid lord may, &c. WE command you &c. at the court of your ſaid lord of *J.* you receive in the place of him the ſaid *S.* for this purpoſe, without difficulty WITNESS &c.

*Note*, If a tenant by his letter patent under his ſeal make an attorney for him to do his ſuit at the lords court, or at the hundred court, and the bailiffs will not admit of him, then he may have a writ directed to them in the following form;

*Form of the writ de attornato faciendo vel recipiendo, where the bailiffs refuſe to allow the attorney appointed by the party to act.*

GEORGE the Third &c. To the bailiffs of the dean and chapter of the church of the *bleſſed Mary* of *Lincoln* of *C.* or of the hundred of *S. greeting:* BECAUSE &c. [*as in the foregoing writs until*] WE command you that the attorney whom *S.* ſhall make to be his attorney by his letters patent in his place, to do his ſuit for him at the court of the ſaid dean and chapter of *C.* or at the hundred of the ſaid dean and chapter of *C.* you receive in the place of him the ſaid *S.* for this purpoſe, without difficulty for this time, of our ſpecial favor, &c.

If brought by a guardian, the writ runs in the following form:

*Form of the writ de attornato faciendo vel recipiendo, when brought by a guardian.*

GEORGE the Third &c. WE command you, that the attorney whom *S.* guardian of the land and heir of *R.* ſhall make to be his attorney in his place to do ſuit for him in the name of the ſaid heir &c. you receive in the place of him the ſaid guardian for this purpoſe without difficulty, &c,

If the writ is directed to the King's bailiff, it muſt be in the following form;

Form

*Form of the writ de attornato faciendo vel recipiendo, when directed to the King's bailiff.*

GEORGE the Third, &c. To my bailiff of the *honour* of *Peverel*, in the county of *N. greeting:* BECAUSE &c. WE command you, that the attorney whom *S.* ſhall make in his place to do ſuit for him at our court, of the *honour* aforeſaid, in the county aforeſaid, you receive in the place of him the ſaid *S.* &c.

If a perſon makes an attorney to do ſuit for him at the *county court*, hundred, or other court, and the bailiff will not admit him for his attorney, or if the bailiff does admit him as attorney and diſcharge him after the year, ſuppoſing that he ought not to continue attorney for the party above *one year*, or for any other unreaſonable cauſe he is diſcharged from being attorney for the party, then the party may have a ſpecial writ directed unto the bailiff, &c. commanding him that he receive him for his attorney, and thereon he may have an *alias*, *pluries*, and *attachment* againſt him, returnable in the *common pleas* or in the *king's bench*, if he will not admit him for his attorney, or return a cauſe on the *pluries* which ſhall be allowable, wherefore he does not admit him, and the writ ſhall be in the following form:

*Form of the writ de attornato faciendo vel recipiendo, where the bailiff will not admit an attorney.*

GEORGE the Third &c. To the bailiff of *A.* of the hundred of *B. greeting:* It is ſhewed unto us on the behalf of *C.* that *Whereas* by our writ he made his attorney to do ſuit for him at the aforeſaid hundred of our Lord of *B.* in the ſame hundred, before you, and the ſame attorney by the ſame writ being admitted for this purpoſe, hath hitherto done that ſuit as the cuſtom is in our realm; you of your own preſumption, voluntarily inſinuating, and pretending cauſe, that the power of ſuch attorney ought not to continue above *one year*, do not permit him the ſaid *C.* to do his ſuit by his attorney aforeſaid, to the great damage and grievance of him the ſaid *C.* at which we very much wonder and are moved: and becauſe the virtue of our writs for making ſuch attorneys is not limited, neither is the term limited to the perſons who are required for this purpoſe, WE being willing to apply a remedy hereupon, that the ſaid *C.* or others may not be unduly vexed or aggrieved by the cauſe aforeſaid, command you, firmly enjoining, that for the further deſiſting from bringing ſuch voluntary and undue vexations and grievances to the ſaid *C.* or to others for the ſaid cauſe, you permit him the

ſaid *C.* to do his ſuit aforeſaid by his ſaid attorney without any difficulty whatſoever, according to the tenor of our former writ to you thereupon directed; and ſo behave yourſelf in this matter, that the aforeſaid *C.* by the cauſe aforeſaid, be not put in default, nor be loſing in any thing; and that we may be no more ſolicited hereupon, whereby we ought to put our hand to this in another manner, WITNESS, *&c.*

*Note*, The party may make an attorney by the Kings writ directed unto the bailiffs, commanding them for to receive ſuch perſon for his attorney.

Or,

He may have a writ from the *Chancery* directed unto the bailiffs or ſheriff, to receive any ſuch perſon for his attorney, that he will preſent unto the ſaid bailiffs or ſheriff, to be his attorney to do his ſuit.

Or,

He may make an attorney by letters patent directed unto the bailiffs, without ſuing forth any ſuch writ.

If a perſon ſues forth a writ directed unto the bailiffs, to admit one for attorney to do his ſuit for him, and the bailiffs refuſe to admit him, the party who ſued forth the writ, ſhall have an attachment againſt the bailiffs for that refuſal, without ſuing forth an *alias* or a *pluries* directed unto them.

The ſame law holds, if a tenant by his letters patent make one attorney to his ſuit for him, and the ſheriff or bailiff, of the court does refuſe to admit him for his attorney, on that refuſal, the party ſhall have an attachment againſt the bailiff, *&c.* although he has not ſued forth any writ directed to him before, becauſe they have acted againſt the ſtatute, which requires, that they admit him for attorney whom the tenant ſhall make to be his attorney.

*Note*, The party may have the like writ againſt the bailiffs of any other lord, who ſhall refuſe to admit an attorney to do ſuit for the tenant of any *court-baron*.

For further inſtructions touching writs directed to the ſheriff, to proſecute ſuits in his *county-court*, See *Fitzh. N. B.*

## *Sheriff's Tourn.*

THE *tourn* is a court of record, held before the ſheriff: The *leet* is derived out of the ſheriff's *tourn*, and after the grant of this derivative *leet*, the ſheriff in his *tourn* is not to meddle within the

reach of this *leet*, except in case of negligence of the *leet*, unless it be where the *leet* is forfeited into the King's hands.

If a person be under no particular *leet*, he is within the sheriff's *tourn*.

The sheriff's *tourn* is the supreme *leet* of the county, and neglects of the *leet* are inquirable in the *tourn*.

The stile of the *tourn* is,

*View of frank pledge of the lord the king, held at* L. *before the sheriff in his* tourn, &c. [*and not the sheriff's* tourn *held such a day at* L.]

Or,

*The court of the view of frank pledge of the Lord the King, at* B. *before the sheriff in his* tourn [*and not the sheriff's* tourn *held*, &c. *for* tourn *is nothing but a perambulation.*]

The *tourn* is incident to the office of sheriff.

By *stat.* 4 *Hen.* 6. *cap.* 10. Nothing shall be inquired before the sheriff in the *tourn*, but actions popular, common nusances, affrays and blood.

By the same *stat.* an assault made on a man is not inquirable there, it being but a *tort* to a particular person, for which an action of *trespass* lies.

The stopping of a water, which is a nuisance to the country people, may be inquired there, for it is popular: so of a bridge, *&c.*

They may *amerce* for common nuisances; and so may stewards of *letts*, notwithstanding the *stat.* of *Marlb. c.* 18.

By *stat.* 29 Edw. 3. 21. *b.* If the sheriff finds in his *tourn*, that a person has erected a *purpresture* in the King's highway, he may abate it.

What is presentable in a *franchise*; as default in repairing a causeway, is not presentable in the *tourn*, because out of his jurisdiction being in the *franchise*: But if the default be in the lord for not repairing it, this may be presented in the *tourn*, because the *franchise* was first derived out of the *tourn*.

By *stat.* 1 *Edw.* 4. *c.* 2. the presentment shall be by the sheriff at the next quarter-sessions, and there it shall be inrolled, and upon this they assess the fines, and amercements, and shall make process to levy it to the use of the sheriff.

By

By *ſtatute*, 21 *Edward* 3. *cap.* 15. the *tourn* ought to be kept within a week after the feaſt of *Eaſter*, and after the feaſt of St. *Michael*.

*Note*, Barons; and tenants in *ancient demeſne*, are not amerciable.

The buſineſs of the *leet* has declined for many years; and is devolved on the quarter-ſeſſions.

The *Hundred court* is derived out of the *county-court*, for the eaſe of the people, as the *leet* was out of the *tourn*.

The ſtile is thus:

*The court of Sir* E. C. *Knight, of his hundred of* B. *held in the county of* B. *before* J. S. *ſteward.*

## GAOLS AND PRISONERS.

BY *ſtat.* 14 *Edw.* 3. *ſtat.* 1. *c.* 10. which is confirmed by 19 *H.* 7. *c.* 10. The cuſtody of county gaols is incident to the office of ſheriff, and inſeparable therefrom; and therefore if the King grant cuſtody of ſuch gaol to another, it is void: For the ſheriff is the immediate officer of the King's courts, and ſhall be anſwerable for eſcapes, and be ſubject to amerciaments, and therefore he ſhall put in ſuch keepers as he ſhall anſwer for.

The ſheriff may remove his gaol from one place to another within his bailiwick, and the ſheriff may hold the *aſſizes* in the caſtle where he held them by *preſcription*, although the King grant the cuſtody of the caſtle to another. So that though the ſheriff may keep the gaol in what place he will, within his bailiwick, yet it muſt be in a particular place not without *preſcription*.

As the King may by his letters patent make a county, ſo he may, in the making of it, ſave and except to him and his ſucceſſors, ſuch part of the juriſdiction or privilege, which the other county (from which it is exempted) had in it before. As in many places in the realm, the gaol of a town, which is a county of itſelf, or a place privileged from the county, is the gaol of the county, and the place where the aſſizes or gaol-delivery is holden, is within the county of the town, and yet ſerves alſo for the county at large. As in the ſeſſions-hall at *Newgate*, which ſerves as well for the county of *Middleſex* as for *London*; and yet it ſtands in *London*: But by uſage it hath been ſo. And ſo is the gaol of *Berry* &c.

Though *Newgate* is a ſeveral priſon both for *London* and *Middleſex*, yet a priſoner in *Newgate*, on the *London* ſide, ſhall not be charged with actions in *Middleſex*.

The ſheriffs of *London*'s court is moveable, and the ſheriff is chargeable with a priſoner while he is in priſon, though he be judge alſo. For why ſhould the *city ſerjeants* give ſecurity to the ſheriff, unleſs the ſheriff be the officer? And it hath been ruled, that although the ſheriff be judge, yet a precept is directed to him. Therefore it is a good plea in *debt* on *eſcape*, that the ſheriff commanded the ſerjeant at mace to deliver the priſoner to him.

The ſheriffs of *London* may make their houſes their priſons, as well as the *compters*; and the bringing the perſon arreſted to the ſheriff, though it be *ſub die*, and not into any houſe, yet it is as good as delivering him into the ſheriff's priſon.

No priſoner ſhall be put in irons but ſuch as have been apprehended for *felony*, or *treſpaſſes* committed in *parks* or *vivaries*, and thoſe who have been found in arrear on account; nor ſhall any priſoner be puniſhed or tortured in any other manner, than by law they ought, and that none diſſeiſe them whilſt they are in priſon, of any thing which belongs to them.

If a priſoner die, whether by diſeaſe or accident, the *coroner*, on notice of ſuch death, which notice the gaoler is obliged to give in due time, ought to reſort to the gaol, and there, upon view of the body, make inquiſition into the cauſe of the death. And if the death was owing to cruel and oppreſſive uſage on the part of the gaoler, or any officer of his, or, as the law ſtiles, it *to dureſs of impriſonment*, it will be deemed wilful murder in the perſon guilty of ſuch *dureſs*: becauſe, though in a *civil ſuit* the principal may, in ſome caſes be anſwerable in damages to the party injured, through the default of the deputy, on the principle of *reſpondeat ſuperior*, yet in a *capital* proſecution, the ſole object of which, is the puniſhment of the delinquent, where each man muſt anſwer for his own acts or defaults.

By *ſtat.* 25 *Geo.* 2. *c.* 37. *ſect.* 6. "After conviction and judgment, the gaoler to whom ſuch criminal ſhall be delivered, ſhall confine ſuch priſoner to ſome cell or ſafe place within the priſon, ſeparate from the other priſoners; and no perſon, *except* the gaoler or his ſervants, ſhall have acceſs to ſuch priſoner, without licence under the hand of ſuch judge before whom ſuch offender was tried, or under the hand of the ſheriff or under-ſheriff."

By ſame *ſtat.* "After ſentence, and until execution, ſuch offender ſhall be fed with bread and water only, (*except* in caſe of receiving the *Sacrament of the Lord's Supper*, and *except* in caſe of any violent ſickneſs or wound, in which caſe ſome known phyſician, ſur-

geon, or apothecary, may be admitted to administer neceſſaries; the chriſtian and ſurname of the phyſician, &c. and place of abode, being firſt entered in the books of ſuch priſon); and in caſe ſuch gaoler offend againſt, or neglect to put in execution, any of the directions hereby enacted, he ſhall forfeit his office, and be found, and be fined 20 *l.* and ſuffer impriſonment until the ſame be paid."

Where the impriſonment is unlawful, the priſoner is not to pay for his diet.

If a priſoner is in execution, and the gaoler or ſheriff die, he is in *obeyance* and cuſtody of the law.

A gaoler is not bound to deliver his priſoner, who is diſcharged by the court, until he pays his due fees.

On a priſoner being acquitted of a felony, the gaoler may take *twenty-pence*, which is called a bar fee.

By *ſtat.* 3 *H.* 7. *cap.* 3. Every ſheriff, bailiff of a franchiſe, and every other perſon having authority of keeping gaols, or of priſoners for felony, ſhall certify the names of every ſuch priſoner in their keeping, at the next general gaol-delivery, in every county or franchiſe where ſuch gaol is, there to be calendared before the juſtices of the delivery of the ſame gaol, whereby they may, as well for the King as the party, proceed to make delivery of ſuch priſoners according to the law, on pain of *five pounds*

A bond given to be a true priſoner (as by law he ought) is good, and not within the ſtatute of 23 *H.* 6.

## *Caſes determined on bonds given to gaolers, &c.*

The marſhal brings debt on bond; the condition was, if the above bounden *A. P.* now priſoner in the *King's Bench* in *Southwark*, do and ſhall from henceforth be and continue a true priſoner, in the cuſtody, guard, and ſafe-keeping of the abovenamed *J. L.* marſhal of the ſame priſon; and in the cuſtody, guard, and ſafe-keeping of his deputy, officers and ſervants, or ſome or one of them, until he ſhall be lawfully diſcharged, without committing any manner of eſcape or eſcapes, during the time of his reſtraint, then this preſent obligation to be void.

The defendant pleads the *ſtatute* of 23 *H.* 6. of obligations made to the ſheriff *by colour of his office*. And further pleads, that at the time, and long before the plaintiff was marſhal, that *P.* at the ſame time was a priſoner at the ſuit of, &c. and that the defendant, together with the ſaid *P. for eaſement and favour* to be ſhewed by the plaintiff to the

the ſaid *P.* made the ſaid bond, &c. The plaintiff replies, the bond was *for a better ſecurity* of the ſaid plaintiff; that the ſaid *P.* ſhould not eſcape, and traverſeth the *eaſe and favour*. The defendant demurs.

And the court came to the following reſolutions:

1ſt. That the marſhal of the *King's Bench* is within the words, *gaoler and keeper of priſons*.

2dly. Bonds made to gaolers for *eaſe and favour* of priſoners are void.

3dly. A bond to ſave harmleſs from *eſcapes*, is within this ſtatute, and void; but a bond to continue a true priſoner is good: and there is no agreement, that it is for *eaſe and favour*, appears; but the contrary; for the plaintiff in his replication hath traverſed it, and the defendant hath confeſſed the replication to be true by his demurrer. *Saund.* 162. *Latch.* 23, 143.

The intention of the obligation was for *eaſe and favour*, and traverſing it hath taken it away.

Now when the defendant had ſuch iſſue offered, and refuſed to join, but demurs; the defendant agreed it was not for *eaſe and favour*. *Sid.* 283.

Note, *A little evidence in ſuch caſe would ſerve to prove eaſe and favour*.

A bond to the warden of the *Fleet* to be a true priſoner. The defendant, without pleading the ſtatute, ſaith, it was for *eaſe* and *favour*. The plaintiff demurs. The plaintiff ſhould have traverſed the *eaſe*. And judgment for the defendant. 3 *Keb. Rep.* 320. *pl.* 8. *Id.* 361. *pl.* 36.

Condition is, where *D. F.* is under his cuſtody (*i. e.* of the obligee) upon arreſt, at the ſuit of the plaintiff, in an action of debt of 1400 *l.* upon bond by him to the plaintiff, and at the requeſt of the defendant he is permitted to go at large for *ſix days*. If therefore the ſaid *D.* before the 12th of *February*, renders himſelf priſoner to the ſheriff of *Middleſex*, at the plaintiff's ſuit, on an action of 1400 *l.* and remains a true priſoner till he ſhall be diſcharged by conſent of the plaintiff. 2 *Jo.* 139. *Sid.* 132.

The condition of a bond was, if *T. M.* keep the ſheriff without damage againſt our Lord the King, and one *T. P.* and at all times be at the commandment of the ſaid ſheriff, as a true priſoner, and appear before the juſtices, &c. then the obligation to be void.

The

The defendant pleaded the *ſtatute* 23 *H.* 6. and that the body of *T. M.* was in execution on a recognizance, and that the ſheriff made the obligation for the delivery of the ſaid *T. M.* and demanded judgment *If the action, &c.*

This is no good concluſion of the plea; he ought to have concluded, *iſſint nient ſans fait:* for the *ſtatute* ſaith it ſhall be void; and if it ſhall be void, then it ſhall be void from the beginning, and then it is not his deed. And further, that he had not wiſely concluded his plea; for this ſpecial concluſion had ſtraitened the defendant ſo, that if the obligation be void for another cauſe, the defendant ſhall not have benefit of it. And yet becauſe it appeared to the judges on the matter in law, that the plaintiff had no cauſe of action, the court gave judgment againſt him; for the obligation is void by the letter of the *ſtatute*, for it makes void obligations taken in another manner, which extends to avoid obligations for bailing thoſe which are contained in the ſecond branch, as thoſe in execution, *&c.* *Plowd.* 66, 67.

But as for the concluſion of the plea, the condition was, that the defendant ſhould appear in *B. R.* to anſwer in a plea of treſpaſs, and ſatisfy the damages. The defendant pleads the *ſtatute* of 23 *H.* 6. that the bond was made for his enlargement, and *iſſint non eſt factum.* The plaintiff demurs ſpecially upon the concluſion of the plea, which ought to be judgment *If the action, &c.* and agreed the plea to be ill. *Al.* 85.

The defendant and *L.* were jointly bound for the true impriſonment of *W.* and there was a warrant of attorney to confeſs judgment on the eſcape of *W. G.* moved to ſet aſide the judgment, being a way for eaſe only, and judgment entered without trial of the eſcape.

*Per cur'*, It is to be entered on an action brought, which is brought, and the parties are at iſſue. But Sir *J. L.* aſſigned his ſecurity to the creditor, which *per cur'* is well enough; and there appearing no fraud, they refuſed to ſet aſide the judgment. *Keb. Rep.* 115. *pl.* 93.

If the marſhal takes bond of one in execution to be a true priſoner, who eſcapes; and an action is brought againſt him, it is held well, for the bond is good. The *Marſhalſea* was ruled to be enlarged, and this ſhall be called *within the rules*; and if the marſhal takes a bond to tarry there, it is good. *Latch.* 143. *Poph.* 165.

A bond to the marſhal, *&c.* to ſave harmleſs from *eſcapes*, is void, and within the ſtatute; becauſe it is not a bond that he ſhall continue a true priſoner. 2 *Keb. Rep.* 422. *pl.* 55. *Sid.* 383. *pl.* 15.

The marſhal ought not to take bond for *chamber-rent*; this is to come in, in allowance of fees. The warden, or other gaoler, cannot impoſe

impoſe what rents they will on chambers. 3 *Kep. Rep.* 103. *pl.* 5; 133. *pl.* 57. 603. *pl.* 44.

A bond or covenant for fees is void; but a bond for true impriſonment is not void *prima facie*, without circumſtances, *&c.* 3 *Keb. Rep.* 133. *pl.* 44.

A bond for chamber-rent is void by *common-law*; becauſe the party is reſtrained *againſt his will*, and ſhall be impriſoned till payment: Alſo the ſtatute extends to the marſhal only for ſuch bonds as they may take *by virtue of their office*. *Latch* 10. So for meat or drink.

Upon a ſtatute acknowledged, and extent ſued; the ſheriff takes bond of 20 *l.* for payment of 10 *l.* his fee; and this was before the *liberate*. It is a void bond. 1ſt. Becauſe he takes the bond before the *liberate*. 2dly. He took his wages before he did his work. 3 *Keb. Rep.* 678. *pl.* 55.

Debt was brought upon a bond made to a bailiff of a liberty to ſave him harmleſs, concerning goods which he had levied by a warrant; and as the goods of one *K.* and had delivered them to the defendant upon requeſt, who made claim to the goods, and returned *nulla bona*, *&c.* Defendant pleaded in bar *non damnificatus*. Plaintiff replies, and ſhews how, and the defendant demurred. It was hereupon inſiſted for the defendant, that the bond was againſt law, becauſe it was to ſave the plaintiff harmleſs from a falſe return: but on the other ſide it was inſiſted, that the bond was lawful; and to prove it ſeveral authorities were cited; and by the opinion of the whole court judgment was given for the plaintiff. *Lutw.* 593, 596.

*Note*, A promiſe is within the ſtatute, as well as bond. But it is where the bond or promiſe is made by the priſoner himſelf, or ſome other for him. And therefore in an action on the caſe the defendant promiſed the plaintiff, that if *B.* (a ſpecial bailiff at his nomination) arreſted *A.* at his ſuit on *Cap.' ad ſatisfaciend'*, and ſuffered him to eſcape, he would not ſue the plaintiff; this is not within this ſtatute. *Leon.* 132.

But *Hobart* C. J. in *N. S.*'s caſe ſays, *Covenant* is not within this ſtatute; that is, becauſe it was not a bond (for performance) made in the behalf of a priſoner, as *B.*'s. caſe is. *Hob.* 13.

A promiſe made to a gaoler to ſuffer a priſoner to go at large, is void. 2 *Bulſtr.* 213.

By *ſtatute* 13 *Car.* 2. *ſt.* 2. *c.* 2. Perſons arreſted by proceſs out of the *King's Bench* or *Common Pleas*, not expreſſing the cauſe of action in the writ, bill or proceſs, and which are bailable by the *ſtatute* of 23 *H.* 6. *c.* 10. ſhall give bail-bond not exceeding the ſum of

of 40*l.* and upon appearance at the return, he ſhall diſcharge ſuch bail-bonds. And if the plaintiff do not declare before the end of the next term after appearance, then he ſhall be nonſuit, and judgment and coſts ſhall be againſt him. But this *ſtatute* extends not to arreſts upon a *capias utlegat'*, *attachment* or *reſcous*, *contempt* or *privilege*; nor to popular actions, or actions on any penal law (except for tithes), indictment, or information.

If the ſheriff in ſuch perſonal actions does take a bond of 150*l.* (where it ought to be but 40*l.*) the party ſhall have an action upon the *ſtatute* againſt the ſheriff; but the bond is not void. This was the caſe of a coroner. 2 *Keb. Rep.* 400. *pl.* 3. *Id.* 287 *pl.* 61.

And therefore, where it is ſaid, the *ſtatute* does not reſtrain him from any ſum, is good law; but with this caution, that the action lies againſt him if he exceed 40*l.* of a plea of debt generally, upon this late *ſtatute*. *Cro. Jac.* 286.

## Bailiffs.

SHERIFF's bailiffs, or bailiffs of *hundreds*, are under officers belonging to the ſheriff, and are appointed by him in every *hundred*, they are to execute all writs directed to the ſheriff, by virtue of the ſheriff's precept or warrant, within the *hundred*. They are likewiſe to collect *poſt-fines*, *fee-farms* of the King, *&c.* for the ſheriff; to attend juſtices of *aſſize*, *gaol-delivery*, and *juſtices of peace*, in every of their courts and ſeſſions.

Bailiffs, being officers, who are to execute the King's writs, are moſt commonly puniſhed in thoſe courts out of which ſuch writs iſſue, by *attachment*; but it is impoſſible to ſet down all ſuch miſdemeanors and oppreſſive practices of which the court is to determine, for which they ſhall be puniſhed; however *attachments* have been granted againſt them where they have uſed needleſs force, violence and terror in making an arreſt; or where they have broke open doors where by law they ought not, and there was no plauſible excuſe for doing it; where they have treated the perſons arreſted baſely and inhumanly, or kept them in cuſtody till they conſented to pay money for their deliverance; or for making an arreſt without authority, by force of a blank warrant filled up with the name of a ſpecial bailiff, by the party himſelf, without the privity or ſubſequent agreement of the ſheriff; or if a bailiff levy a debt by virtue of an execution, and keep the money in his hands, and imbezzle it; but even in theſe caſes there may be ſuch circumſtances or matters of alleviation as will induce the court to excuſe, if not wholly diſcharge them.

By *ſtatute* 32 *Geo.* 2. *c.* 28. *ſect.* 1. No ſheriff, bailiff, or other officer, ſhall convey any perſon arreſted by virtue of any proceſs to any

public victualling or drinking houſe, or to the houſe of ſuch officer, or of any tenant or relation of his, without the conſent of the perſon arreſted; nor charge him for wine, victuals, or any liquor or things whatſoever, ſave what he ſhall call for; nor ſhall cauſe him to call or pay for any ſuch liquor or things, except what he ſhall particularly and freely aſk for; nor ſhall take any greater ſum than is by law allowed for any arreſt, or for detaining, or waiting till the perſon arreſted has given an appearance or bail, or agreed with the perſon at whoſe ſuit he is arreſted, or until he be ſent to the gaol belonging to the county or place where ſuch arreſt ſhall be; nor ſhall take any reward for keeping the perſon arreſted out of gaol; nor ſhall carry any ſuch perſon to gaol within *twenty-four hours* from the time of ſuch arreſt, unleſs ſuch perſon refuſe to be carried to ſome ſafe and convenient dwelling houſe of his own nomination within a city, borough, corporation, or market town, in caſe ſuch perſon be there arreſted; or within *three miles* from the place where ſuch arreſt ſhall be, if the ſame be made out of any city, *&c.* ſo as ſuch dwelling houſe be not the houſe of the perſon arreſted, and be within the county or liberty in which the perſon was arreſted; and then it ſhall be lawful for ſuch officer to convey the perſon ſo arreſted, and refuſing to be carried to ſuch ſafe and convenient dwelling houſe, to gaol.

By ſame *ſtatute* every ſheriff, under-ſheriff, and bailiff of any liberty, and the reſpective ſecondaries and clerks ſitters in the compters in *London*, and all other perſons intruſted with the execution of proceſs, or who ſhall enter any actions, or make any warrant, or any writ or proceſs, in order to have the ſame executed, ſhall deliver a printed copy of the ſeveral clauſes in this act relating to bailiffs, and other officers and perſons employed under them to execute any proceſs, or who ſhall arreſt any perſon on any action entered there, or otherwiſe, within their reſpective ſheriffwicks or juriſdictions, to every ſuch bailiff, *&c.* and ſhall make it part of the condition of every ſecurity given to any ſuch ſheriff or under-ſheriff, or bailiff of any liberty, by any bailiff or perſon employed to execute proceſs, that every ſuch bailiff, *&c.* ſhall ſhew and deliver a copy of the ſaid clauſes to every perſon he ſhall arreſt and carry to any public or other houſe where any liquor ſhall be ſold, and ſhall permit every ſuch perſon arreſted, or any friend of him or her, to read over the ſame clauſes, before any liquor or victuals be called for or brought to ſuch perſon under arreſt there; and in caſe any bailiff, *&c.* offend in the premiſes, every ſuch offence, beſides the breach of the condition of ſuch ſecurity bond, ſhall be deemed a miſdemeanor in the execution of the proceſs on which ſuch perſon was arreſted, and ſhall be puniſhable as ſuch by this act.

## *Adjudications on the power and duty of a bailiff.*

Motion for an information againſt a bailiff for carrying a perſon, whom he had under an arreſt, to an alehouſe againſt his will; this being

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ing an offence againſt an act of parliament; and this he prayed notwithſtanding the proceſs was out of the *Common Pleas*; he ſaid he did allow, that there was a clauſe in the *ſtatute*, which gave the party injured a liberty to proceed in a ſummary method, by petition to the court out of which the proceſs iſſues; but he ſubmitted it, the party had a right to wave that liberty, and to proceed in the ordinary courſe of juſtice notwithſtanding. The court ſaid, that might be a matter proper to be conſidered of; ſo made a rule to ſhew cauſe. *Salk.* 45, 460. *Barnard. K. B.* 259.

On ſhewing cauſe, the court was of opinion, that though this was an offence before the act of parliament, yet the intent of the legiſlature was, that the offender ſhould be puniſhed only in a ſummary method, by applying to the court where the offence was committed; and therefore refuſed to interpoſe their authority by information. *Barnard. K. B.* 296.

On the complaint of one Mr. *B.* againſt the defendant, who was a bailiff, for refuſing to carry him to the houſe which he appointed, and for not reading the clauſe in *ſtatute* 2 *Geo.* 2. *c.* 22. when he arreſted him; the court ordered the defendant to pay Mr. *B.* 5*l.* for his damages, together with his coſts; and likewiſe committed him for the contempt. 2 *Barnard. K. B.* 213.

The defendant petitioned the court againſt certain ſheriff's officers for extortion, *&c.* praying relief according to *ſtatute* 2 *Geo.* 2. *c.* 22. and the court made a rule for the bailiffs to ſhew cauſe why an attachment ſhould not be iſſued againſt them, and not to anſwer the matters complained of; it being contrary to the practice of the court. *Barnes* 26.

No bailiff or ſheriff's officer ſhall preſume to exact or take from any perſon, being in his cuſtody by arreſt, any warrant to acknowledge a judgment, but in the preſence of an attorney for the defendant, which attorney ſhall then ſubſcribe his name thereunto; upon pain of being ſeverely puniſhed for ſo doing. *Lil. Abr.* 115, 194.

*It was held*, that a warrant to confeſs a judgment taken of a man under arreſt, in the preſence of an attorney's clerk or ſolicitor, was void. *Stra. vol.* 2. *p.* 902.

The ſheriff is not bound to execute attachments in perſon, but may do it by his bailiff. And that which is done by the warrant of the ſheriff is done by the ſheriff himſelf, for the act of his ſervant, is his own act. *Dy.* 241. 2 *Rol. Rep.* 457. Lord *Raym.* 21.

A bailiff of an hundred may execute a writ out of the hundred where he is bailiff, for he is bailiff of all the country over. *Lil. Abr.* 266.

A ſheriff's bailiff ſhall not be prejudiced by the non-return or miſ-return of the ſheriff. The defendant (as bailiff of an hundred) took goods in execution on *fieri fac'*, and ſold them, and delivered the money to the ſheriff; it is good, and no *Trover* lies againſt the ſheriff, for they did execute, *as the writ required*. *Leon.* 144. *pl.* 200.

The falſe return of the ſheriff ſhall not make the bailiff puniſhable in an action; for he is bailiff *errant*, and a mere ſervant. As the bailiff juſtifies by the ſheriff's warrant, plaintiff replies, the ſheriff returned upon the writ, *Tarae*. *Dr. & Stud. b.* 2. *p.* 127. *Cro. El.* 181.

If a bailiff *errant*, or ſpecial bailiff, arreſt a man upon a *Capias ad ſatisfaciendum*, and after the priſoner reſcue himſelf, he at whoſe ſuit he was arreſted cannot have an *Action on the Caſe* on the eſcape againſt the bailiff, but he ought to have it againſt the ſheriff; for the bailiff is but a ſervant to the ſheriff. *Vin. Abr.* 573. *pl.* 3.

In an action againſt the ſheriff for a falſe return on two *Fi. fa.* the officers who took the goods in execution were called as witneſſes for the defendant; and the counſel for the plaintiff objected to their being ſworn, becauſe they generally gave ſecurity to the ſheriff. Here the chief juſtice ſaid, that did not yet appear, but aſked the officers, on which they owned they had given ſecurity, but that they had delivered the goods over to the aſſignees by order of the under-ſheriff, and they had a warrant from the under-ſheriff, which they called a *ſuperſedeas* for their ſo doing; and upon its being produced and read, their teſtimony was allowed, for that it appeared to be a full indemnity to them from the ſheriff for what they had done. *Gen. Syſt. of Bank.* 25, 26. *Law of Bank*, 289.

In an action againſt the ſheriff for a falſe return of *non eſt inventus* on *meſne* proceſs; lord chief juſtice *Raymond* refuſed to admit the ſheriff's bailiff who had the warrant, to be a witneſs on the trial to prove, on behalf of the ſheriff, that he often endeavoured to have arreſted the defendant in the original action, on the *Ca. ſa.* but could not, for the bailiff was no legal witneſs, becauſe he is intereſted in the cauſe, having given ſecurity for his due executing proceſs, and by conſequence could not be a witneſs in his own cauſe. *Stra.* 650. *Raym. vol.* 2. *p.* 1412.

The under-ſheriff brought an action of debt againſt one of his bailiffs on a bond to ſave him harmleſs in executing proceſs, *&c.* and aſſigns for breach that the bailiff had not executed ſuch his warrant ſent to him on a proceſs directed out of the *Exchequer*, to levy iſſues upon certain lands. The defendant demurs, 1ſt. Becauſe the warrant directed to him, was made out of the county. 2d. It is not alledged, that the manor of — where he was by the warrant to levy the iſſues, is within the hundred where the

the bailiff had jurisdiction: *The court* said it was a good exception, and the breach is not shewn to be within the obligation; because a bailiff cannot execute a precept out of the hundred where he is bailiff. *Stil.* 18. *Al.* 10. For though the words of the condition were general, to make return of all warrants directed to him, yet it was understood of such only as were to be executed within the hundred of which he was made bailiff. 2 *Saund.* 414.

*By Rule*, Mich. 1732, in *C. B. reciting that*, Whereas many inconveniencies happen in causes depending in this court, by reason that sheriffs officers, bailiffs, and other persons concerned in the execution of process, offer themselves, and are permitted to be bail in any actions, and for great sums of money; now for prevention of the like mischief and inconvenience for the future; *It is ordered* by the lord chief justice, and the rest of the justices of this court, that from and after the last day of this present term, no sheriff's officer, bailiff or other person concerned in the execution of process shall be permitted or suffered to become bail in any action or suit depending in this court.

*K. B. Per curiam*, We have seen so much oppression in letting the sheriff's officers be bail, that we think proper to concur with the *Common Pleas* in a general rule, not to accept them or serjeants at mace. Vide *Stra. vol.* 2. *p.* 890.

On a writ of error brought, it was objected to one of the bail, that he was a palace-court officer; but over-ruled, and the bail allowed. The rule of this court to prevent sheriff's officers, and other persons concerned in the execution of process, from being bail, extends only to process of this court, whereon defendants having been bailed by the officers who arrested them, were greatly imposed on and abused. 2 *Barnes Notes* 79.

A palace-court officer offered to justify himself in court as one of the defendant's bail; the plaintiff objected, that no sheriff's officer, bailiff, or other person concerned in the execution of process, can be bail by the general rule of *Mich.* 6 *Geo.* 2. The defendant answered, that by a case in error, *East.* 20 *Geo.* 2. The court had determined that the said rule related only to bailiffs, executing process of this court. The court exploded the doctrine of that case, which was determined (as thereby appears) in the absence of the lord chief justice, and rejected the bail offered. They held that the rule extends to all bailiffs, officers, and others concerned in the execution of process. The rule was made for the benefit of the plaintiff, not merely to prevent impositions, and abuse on defendants, as in the said case is stated. And an ancient rule of this court *Mich.* 1654. says, that no attorney shall be bail, and a modern rule *Mich.* 6 *Geo.* 2. says, that no attorney of this or any other court, or any person practising as such, shall be bail; the

the rule is the ſame with reſpect to officers, executing the proceſs of this and all other courts. *Suppl. to Barnes Notes* 9. 10.

The bailiff of *Weſtminſter* had returned a bill of *Middleſex* with a *ſuperſedeas* out of *Chancery* becauſe it was with an *ac etiam*; the court conceived the return void, and gave him only *four days* to return his writ, on pain of 100*l.* and would not ſuffer him to take the defendant by a new writ. *Lil. Abr.* 84.

If a diſtreſs at the ſuit of *H.* iſſues out of the court of *C.* directed to *J. S.* (who is not the uſual officer) to diſtrain the cattle of *S. &c.* or that *S.* ſhould find pledges to appear the next court; and thereupon *J. S.* diſtrains the cattle of *S.* and after re-delivers them to *S.* without taking ſufficient ſecurity, *&c.* and *S.* does not appear; an action lies againſt *J. S.* for this deceit, notwithſtanding he is not the known officer, but for the turn only; ſo adjudged on a writ of error. *Lat.* 159.

An action lies not againſt the bailiff for refuſing bail, but for not conveying the party before the ſheriff in order to put in bail. *Vide Mod. Rep. vol.* 2. *p.* 32.

If *H.* brings *T.* to a common inn, of which *C.* is hoſt; and affirms to *C.* that he has arreſted *T.* by virtue of a commiſſion of rebellion; and in conſideration, that *C.* will keep *T.* as a priſoner by the ſpace of one night, aſſumes and promiſes to ſave *C.* harmleſs, *&c.* If *T.* recovers againſt *C.* in an action of falſe impriſonment, *C.* may have an action againſt *H.* on this promiſe; for though the conſideration, *viz.* the keeping of *T.* was unlawful, yet becauſe it did not appear to *C.* to be ſo, the promiſe to ſave him harmleſs was good. *Hut.* 55. *Winch.* 48.

## Their Duty on Arreſts.

IT is commonly ſaid, a known bailiff need not ſhew his warrant, although it be demanded, nor a ſpecial bailiff without demand: In *London*, it is ſaid a *ſerjeant* need not ſhew his *mace*, becauſe he is ſworn and known, although not to the party. 9 *Co.* 69.

*It is held* that a general arreſt by a ſerjeant, by ſhewing his mace, and touching the defendant's body with it, and ſaying, Sir, *I arreſt you*, is not ſufficient, for he ought to ſhew at whoſe ſuit, out of what court, for what, and of what return the writ is, that the party may know what to do. *Bac. Abr.* 232. *Cro. Jac.* 485, 486.

Where the ſheriff doubting a reſcue, cauſes the ſerjeant at mace to arreſt one firſt on an action of 100*l.* entered in *London* ac-

cording to cuſtom, and afterwards the ſheriff arreſts him by *Cap. ad ſatisfac'*, this is unlawful, and the ſerjeant was ſeverely puniſhed for ſo doing. 6 *Co.* 52. *Dalt.* 110.

The ſheriff muſt not diſpute the authority of the court, though the proceſs be erroneous. *Ventr.* 273.

If the officer comes to arreſt a man, and he flies, the officer may purſue him and take him in another county, but he cannot beat him, &c. becauſe he was not arreſted. *Raym.* 237. 2 *Stra.* 1049.

If after the arreſt of the bailiff he flies, or draws weapons, he may. *Dalt.* 111.

Where perſons having authority to arreſt or impriſon, uſing the proper means for that purpoſe, are reſiſted in ſo doing, and the party making reſiſtance is killed in the ſtruggle, this *homicide* is juſtifiable. And on the other hand, if the party having authority to arreſt or impriſon, uſing the proper means, happens to be killed, it will be *murder* in all who take a part in ſuch reſiſtance. For it is *homicide* committed in deſpite of the juſtice of the kingdom. *Anon.*

The rule laid down in this caſe ſuppoſes that reſiſtance is made. And upon that ſuppoſition it will, I conceive, hold in all caſes, whether *civil* or *criminal*, for in the caſe of reſiſtance in either way, the perſon having authority to arreſt or impriſon may repel force with force, and if death enſues in the ſtruggle he will be juſtified. This is founded in reaſon and public utility. For few men would quietly ſubmit to an arreſt, if in every caſe of reſiſtance the party impowered to arreſt was obliged to deſiſt and leave the buſineſs undone. *Rolle's Report* 78.

The caſe of bare flight in order to avoid an arreſt in a *civil* proceeding, and likewiſe in ſome caſes of a *criminal* nature, will fall under a different conſideration. A defendant in a civil ſuit being apprehenſive of an arreſt flies, the officer purſues, and in the purſuit kills him, *This* ſays Lord *Hale will be murder*. Vide *Hal. Hiſt. Pl. Cr.* 481.

*Adjudged by Foſter juſtice*, that it will be *murder* or *manſlaughter*, as circumſtances may vary the caſe. For if the officer in the heat of the purſuit, and merely in order to overtake the defendant, ſhould trip up his heels, or give him a ſtroke with an ordinary cudgel, or other weapon *not likely to kill*, and death ſhould unhappily enſue, he cannot think that this will amount to more than *manſlaughter*. The blood was heated in the purſuit, his prey, *a lawful prey*, juſt within his reach, and no ſignal miſchief was intended. But had he made uſe of a deadly weapon, it would have amounted to murder. The miſchievous vindictive

dictive ſpirit, the *malice*, which always muſt be collected from circumſtances, determins the nature of the offence. *Foſt. Cr. Law.* 270. *to* 271.

Something has been briefly ſaid under the head of *homicide* in advancement of juſtice, touching the killing of officers in the execution of their offices, and of other perſons having authority to arreſt or impriſon, or acting under colour of ſuch authority. But this being a matter in which the juſtice of the kingdom is deeply concerned, I will now (ſays Mr. juſtice *Foſter*) ſubmit to conſideration my thoughts upon that ſubject more at large.

Miniſters of juſtice, while in the execution of their offices, are under the peculiar protection of the law. This ſpecial protection is founded in great wiſdom and equity, and in every principle of political juſtice. For without it the public tranquillity cannot poſſibly be maintained, or private property ſecured; nor in the ordinary courſe of things will offenders of any kind be amenable to juſtice. And for theſe reaſons the killing of officers ſo employed has been deemed murder of *malice prepenſe*, as being an outrage wilfully committed in defiance of the juſtice of the kingdom.

This rule is not confined to the inſtant the officer is upon the ſpot, and at the ſcene of action, engaged in the buſineſs which brought him thither; for he is under the ſame protection of the law going, continuing there, and returning. And therefore if he comes to do his office, and meeting with great oppoſition retires, and in the retreat he is killed, this will amount to murder. He went in obedience to the law, and in the execution of his office, and his retreat was neceſſary in order to avoid the danger that threatened him. And upon the ſame principle, if he meets with oppoſition by the way, and is killed before he comes to the place, *ſuch oppoſition being intended to prevent his doing his duty, which is a fact to be collected from circumſtances appearing in evidence*, this likewiſe will amount to murder. He was ſtrictly in the execution of his office, going to diſcharge the duty the law required of him. *Foſt. Cr. Law* 308 *to* 309.

The miniſters of juſtice in civil ſuits, under proper limitations, are entitled to the ſame protection for themſelves and followers, and upon the ſame principles of political juſtice. *Ibid.* 310.

And in the caſe of arreſts on proceſs, whether by writ or warrant, if the officer named in the proceſs gives notice of his authority, and reſiſtance is made, and the officer is killed, it will be murder; if in fact ſuch notification was true, *and the proceſs legal.* For after ſuch notification the parties oppoſing the arreſt acted at their own peril. *Ibid.* 311.

A bailiff

A bailiff ſtood at the ſtreet door, and ſent his ſervant up three pair of ſtairs in a diſguiſed habit with the warrant, who laid hands on one *W. R.* and told him, that he arreſted him. *Holt, chief juſtice,* doubted if this was a good *arreſt,* being done by *the bailiff's follower* or ſervant, and *not in the preſence of the bailiff himſelf*; but ſaid, that in an action brought thereon, that the plaintiff muſt prove his cauſe of action againſt *W. R.* and muſt prove the writ and warrant by producing the ſworn copies of them. And he muſt prove the manner of the arreſt, that it may appear to the court to be a lawful arreſt; and in point of damages, he muſt likewiſe prove the loſs of his debt, *viz.* that *W. R.* became inſolvent, or could not be re-taken. *Vide Mod. Rep. vol.* 8. *p.* 211.

If a bailiff, having a warrant from a ſheriff on a *capias*, *ſends another* in his room to arreſt the perſon, ſuch arreſt *is illegal. Vide Mod. Rep. vol.* 12. *p.* 73.

On a *capias* returnable on *All Souls* day, which is not a court day, the ſheriff let the party go: The *court* ſaid, it was a bad return; the writ was good, and the detaining of the party on it lawful, and he was commanded to bring him into court. *Poph.* 205.

By ſtat. 29. *Car.* 2. *cap.* 7. No perſon on the Lord's day ſhall ſerve or execute any writ, proceſs, warrant, order, judgment, or decree, (except in caſes of *treaſon, felony,* or *breach of the peace*) but the ſervice of ſuch writ, *&c.* ſhall be void, and the perſons executing the ſame ſhall be liable to anſwer damages, as if they had done the ſame without any warrant.

On a queſtion before the court. Whether ſerving an *attachment* for contempt on a *Sunday* was within the above ſtatute? The words being, That all arreſts on *Sunday*, except for breach of the peace, are void. *Holt chief juſtice* ſaid, Suppoſe it was a warrant to take for *forgery, perjury, &c.* ſhall it not be ſerved on *Sunday?* Sure the Lord's day ought not to be a ſanctuary for malefactors! And this partakes of the nature of proceſs on an indictment, *but the court gave no determinate opinion thereon. Vide Mod. Rep. vol.* 12. *p.* 348.

A warrant for good behaviour may be executed on a *Sunday. Vide Raym. vol.* 1. *p.* 250.

If a bailiff arreſts a man on a *Sunday*, ſince by the above ſtatute all ſuch arreſts are unlawful, and the bailiff is killed in the making ſuch arreſt, perhaps (ſays *Hawkins*) this will be *manſlaughter* only. *Hawk. Pl. Cr.* 86. *chap.* 31. *ſect.* 58.

On a motion to have a defendant diſcharged out of cuſtody, for that he had been arreſted on a *Sunday* by proceſs out of the *K. B.* but in truth he was taken without any warrant on a *Sunday*, and kept locked

up 'till *Monday* morning, and then a writ was got. *By the court:* If a perſon is impriſoned without warrant, he has his remedy by falſe impriſonment; but then he muſt ſhew cauſe why an attachment ſhould not go againſt him. And it was ſaid by *Gould, juſtice*, that attachments have gone frequently in ſuch caſes; and ſo was the rule here. *Vide Mod. Rep. vol.* 6. *p.* 96.

An arreſt on a *Sunday* is a void arreſt, inſomuch that the party may have an action of *falſe impriſonment* for it. *Vide Mod. Rep. vol.* 5. *p.* 95.

A defendant taken on a *capias utlegatum* on a *Sunday*, moved to be diſcharged, the taking being contrary to ſtatute 29 *Car.* 2. *c.* 7. *ſect.* 6. *The court* held the taking bad, but refuſed to grant an attachment, and put the defendant to take the remedy given by the ſtatute. *Barnes's Notes. C. P.* 228.

*By ſtat.* 5 *Ann. cap.* 8. Any perſon may be taken on the Lord's day by virtue of an *eſcape* warrant.

A priſoner eſcaped, and was re-taken on a *Sunday* by virtue of a judge's warrant, called an eſcape warrant. The queſtion before the court was, Whether this taking was ſuch a ſervice of proceſs as was againſt *ſtat.* 29 *Car.* 2. *c.* 7. *By the whole court*: This is a taking in nature of a freſh purſuit, and is no original proceſs, and the gaoler or party might have taken him on a freſh purſuit on a *Sunday* before this ſtatute. *Vide Mod. Rep. vol.* 6. *p.* 95. *Raym. vol.* 2. *p.* 1028.

*Adjudged*, that the party is ſtill on the old commitment continued down. 2 *Salk.* 626. *Raym. vol.* 2. *p.* 1028.

It was held, that this re-taking is not within the meaning of the ſtatute 29 *Car.* 2. and that he might have been re-taken on a *Sunday* without a warrant. *Vide Mod. Rep. vol.* 6. *Salk. vol.* 3. and *Raym. vol.* 2.

It was held otherwiſe in the *C. P.* and the two laſt books ſay, that the barons of the *Exchequer* were equally divided; and that the like motion was made before in the ſame term in the *K. B.* and the court were then of the ſame mind. *Vide Raym. vol.* 2. *p.* 1029.

The bail may take the principal on a *Sunday*, and confine him till *Monday*, and then render him; and this is no ſerving of proceſs, for the entry in the *K. B.* is, *he is delivered upon bail*, &c. It is rather like the caſe where the ſheriff arreſts the defendant on a *Saturday*, who eſcapes, he may take him on a *Sunday*, becauſe it is only a continuation of the former impriſonment. *Vide Mod. Rep. vol.* 6. *p.* 231. *Forteſc. Rep.* 374.

The court was moved, that one arrested on a day of thanksgiving appointed by the parliament, was forced to put in bond to the sheriff for his appearance, might be discharged, and that the bond given to the sheriff might be delivered up. *Rolle chief justice*, advised the party to indict the bailiffs who made the arrest, or bring his action against them, for the court cannot discharge the party arrested. *Styl.* 239.

It was said by *Richardson*, *chief justice*, That upon arresting a man upon *Christmas-day*, going to church in the church-yard, he who made the arrest might be censured in the *Star-chamber*, (*Note this court is abolished by stat.* 16 *Char.* 2. *c.* 10.) for such offence. *Hetley* 19. *Godolph. Rep. Canon* 115. *sect.* 12.

An arrest in the night as well as in the day time is lawful, and as well at the suit of a subject as at the King's suit; for the officer or minister of justice ought to arrest him when he can find him, for otherwise perhaps he will never arrest him, *because he who has done amiss hates the light.* 8 *Co.* 37.

If the officer does not arrest him when he finds him, and may arrest him, the plaintiff shall have an action on the case, and recover all his loss in damages. 9 *Rep.* 66. 5 *Co.* 92.

If a writ is returnable on the *ninth* day of *February*, or *in eight days of the Purification*, the defendant cannot be arrested by virtue of such writ, either on the *tenth* or *eleventh* day of *February*, though it is before the *fourth* day after. The *quarto die post* is only for the appearance and return of the writ, but not for the execution. *Mo.* 701. *pl.* 998. *Cro. Eliz.* 760. *pl.* 33.

If he is arrested, the officer cannot justify it, either in *trespass* or *false imprisonment* brought against him. *Cro. Eliz.* 761. *pl.* 33. *Mo:* 711. *pl.* 998. *Keb.* 805. *pl.* 75. *Sid.* 229. *pl.* 27. *Lev.* 143. *Winch.* 76.

But on a defendant being taken on a *capias ad satisfaciendum* on the *ninth* day of *February*, which was the very day the writ was returnable, the arrest was adjudged good. 3 *Salk.* 46.

In an action of *trespass*, *assault*, and *battery* by special verdict, it appeared that the defendant, as bailiff of the sheriff, arrested the plaintiff the *tenth* day of *February*, on a writ of *non omittas* out of the court of *C. P.* which was returnable in *eight days of the Purification*, which was after the first or *Essoign* day; but the days of grace to the return of the writ are *two days* after: and the court conceived, that although the sheriff may return his writ after, yet his office, as to arresting, is determined on the *Essoign* day, which being no moveable feast, the court may take notice of the day of the month. *Keb.* 718.

The utmoſt length of time the law allows for executing a writ, is the day on which it is returnable, and it is not executable that day any longer than the court ſits. *Vide Mod. Rep. vol.* 6. *p.* 130.

No arreſt muſt be in the King's palace, where his royal perſon reſides. 6 *Mod.* 73. *Raym. vol.* 2. *p.* 978. *Inſt. vol.* 3. *p.* 140, 141.

By ſtat. 28 *H.* 8. *c.* 12. The great manſion-houſe purchaſed by the King, late parcel of the poſſeſſions of the archbiſhop of *York*, and the *Park*, and the ſoil of the ancient palace of *Weſtminſter*, ſhall be the King's whole palace at *Weſtminſter*, and ſhall extend to all the ſtreets leading from *Charing-croſs* unto the *Sanctuary-gate* at *Weſtminſter*, and into all the houſes on both ſides of the ſtreets from the ſaid *Croſs* unto *Weſtminſter-hall*, ſituate between the *Thames* on the *Eaſt*, and the park wall on the *Weſt*.

By ſtat. 13 *Ric.* 2. *ſt.* 1. The court of the ſteward and marſhal of the King's houſe, (*viz.* the *Marſhalſea* court) ſhall not paſs the ſpace of *twelve miles*, to be accounted from the lodging of the King.

Arreſts ought not to be of perſons going to, or coming from church, or in the church-yard. *Hetl.* 19. *Godolph. Rep. Canon.* 115.

Nor in the time of divine ſervice, ſtat. 1 *Rich.* 2. *c.* 15. 50 *Ed.* 3. *c.* 5. *Cro. Jac.* 602. *pl.* 6. unleſs at the King's ſuit. *Cro. Jac.* 321. *pl.* 4. 2. *Bulſtr.* 72. *Godolph. Rep. Canon.* 141. *ſect.* 8.

*Hole, chief juſtice*, ſaid, he had known many attachments granted for arreſting a man as he was going to church, to diſgrace him. *Mod. Rep.* 56. *pl.* 114. *Watſ. Clerg. Law. chap.* 34. *p.* 345.

All perſons whoſe attendance is neceſſary in any of the King's courts at *Weſtminſter*, are privileged from arreſts. *Cromp. Juriſdic. of Courts.* 11.

A perſon who is not privileged from arreſts, by reaſon of his attendance on buſineſs, on ſome court of juſtice, or ſome other way privileged by ſome ſpecial rule or order of court, may be arreſted in *Weſtminſter-hall*, the courts ſitting there; and it has been often done, for it is not the place but their buſineſs, that protects the party 2 *Lil. Abr.* 115.

A perſon arreſted in *Weſtminſter-hall, during the ſitting of the court*, may be diſcharged on motion, if the arreſt was on *meſne proceſs*, but not if he was taken in execution; for in that caſe the officer is puniſhable. 3 *Salk.* 46. *Bulſtr.* 85.

One *L.* was arreſted in *Palace-yard*, not far from *Weſtminſter-hall* gate, the court being then ſitting; and being an attorney of this court, he,

he, together with the officer, was brought into court, and the officer was committed to the *Fleet*, that he might learn to know his diſtance; becauſe the plaintiff was an attorney of the court of *King's Bench*, who informed this court, that his cauſe of action was for 200 *l.* therefore the court ordered, that another of the ſheriff's officers ſhould take charge of the priſoner, and that Mr. *R*——, the chief prothonotary, ſhould go along with him to the court of *King's Bench*, which was done; and the court being informed how the caſe was, diſcharged the defendant on filing *common bail*. The writ on which the party was arreſted was an *attachment of privilege*, which the court ſuppoſed to be ſued out on purpoſe to *ouſt* him of his privilege; for there was another writ againſt him at the ſheriff's office, at the ſuit of another perſon *Vide Mod. Rep. vol.* 2. *p.* 181.

If a perſon be arreſted by the ſheriff of the county, within a liberty, without a *non omittas*, yet the arreſt is good; for the ſheriff is ſheriff of the whole county, but the bailiff of the liberty may have his action againſt the ſheriff for entering of his liberty: but, on a writ of *quo minus*, a ſheriff may enter any liberty, and execute it ſafely. *Barnard. Rep. K. B.* 282, 444.

On a motion that proceedings might be ſtaid on an *affidavit*, that the arreſt was made within the liberties of *London* on a bill of *Middleſex*. The court ſaid, that the affidavit was not ſufficient, for the liberty of *London* may extend into *Middleſex*, though no part of *London* itſelf does. And *Juſtice Page* ſaid, The borough of *Southwark* is within the liberty of *London*, though it lies in the county of *Surry*. The ſame, he ſaid, has been thought of the *Temple*, that it lies within the liberty of *London*, though out of the city and county, and accordingly the motion was denied. 2 *Barnard. Rep. K. B.* 36.

A defendant was arreſted in the *Temple*, and on a motion to ſet it aſide, his counſel inſiſted, that the *Temple* is privileged from arreſts by the King's grant. *Dugdale's Orig. Jur. chap.* 57, 70. *p.* 144, 310. *edit.* 1671 *Stow's Survey of London*, 271. *edit.* 1720.

*Holt, chief juſtice*, if the King has made ſuch a grant, it is void in law, they having no court of juſtice within themſelves there. It is true, the *Temple* is *extra-parochial*, and not within any pariſh, nor within the city, ſo as to come within the cuſtoms of the city, but it is within the county of the city; but *White Friars* is within the juriſdiction of the city; yet the court inclined not to countenance arreſts in the *Temple*, eſpecially in *term time*, but would not ſet aſide this arreſt, ſo the defendant was held to ſpecial bail. 3 *Salk.* 285. *pl.* 13. 45. *pl.* 1. 12 *Mod.* 155. *Skin.* 684. *pl.* 5.

The liberty of the *Rolls* is no privileged place, but as it is for all other courts *going and returning*. *Freem.* 368. *pl.* 474.

The

The *cinque ports* are *Haſtings*, *Dover*, *Hithe*, *Romney*, and *Sandwiche*, whereunto *Winchelſey* and *Rye*, and other towns are joined. 2 *Inſt. c.* 7. *p.* 556. See *Jeake's Chartres of the Cinque Ports*, 1728.

The privilege of the *cinque ports* extends only to the inhabitants, and not to ſtrangers. *Freem.* 12. *pl.* 11.

Nor where the matter or cauſe ariſes without the *cinque ports*. *Godb.* 90. *pl.* 102. *Brownl.* 34.

Nor to an action of debt, or treſpaſs *tranſitory*. *Cro. Eliz.* 910. *pl.* 22. *Yelv.* 12.

A defendant ought to be an inhabitant, otherwiſe treſpaſſes committed within the *cinque ports*, by one who lives out of their liberty, or who would preſently abſent himſelf, would be diſ-puniſhable; and the reaſon of the privilege of the *cinque ports* is, that the inhabitants there, who are to defend the port towns, ſhould not be drawn away, which does not extend to ſtrangers. *Freem.* 13.

Where a ſtranger comes within the *cinque ports*, and does a *tranſitory treſpaſs*, and afterwards goes out of their juriſdiction, he to whom the treſpaſs was done may have an action at *common law*, elſe he would be without remedy; for they can call none in who are out of their juriſdiction, and the privileges were granted for the eaſe and benefit, and not for the prejudice of the inhabitants. *Vide Yelv.* 12. 2 *Inſt. c.* 7.

By the charters granted to the univerſities of *Cambridge* and *Oxford*, bearing date reſpectively in the 4th year of the reign of King *Richard* II. and the firſt day of *April* in the 14th year of King *Henry* VIII. both which were confirmed by ſtat. 13 *Eliz. c.* 29. they are to enquire of all treſpaſſes, injuries, and of all pleas and quarrels, and of all other crimes and matters (except pleas of freehold, *Lit. Rep.* 252. *Cro. Car.* 87. *pl.* 9. *Vern.* 212. *pl.* 200. *Jenk. Cent.* 117. *pl.* 33. 3 *Salk.* 283. *pl.* 6.

Where a ſcholar, their ſervants, or miniſters, are one of the parties, and are to have cognizance and correction thereof, according to their ſtatutes or cuſtoms, or according to the law of our kingdom of *England*, at the will of the chancellor; ſo that the juſtices of the *King's Bench.* or of the *Common Pleas*, or the juſtices of *aſſize*, do not intermeddle; and if the ſaid juſtices ſhould preſume to enquire, or in any manner take cognizance of, or intermeddle, that then, upon the certificate, notification, or ſignification of the chancellor of the univerſity, or his commiſſary, they do ſuperſede ſuch inquiſition or cognizance, and not put the parties to anſwer before them, but that the party ſhall be chaſtized and puniſhed before the chancellor, or his commiſſary only.

10 *Mod.* 226, 128. *Cro. Car.* 73. *pl.* 1. *Lit. Rep.* 40, 41. *Hardr.* 105. *pl.* 4.

The privilege of the univerſities is not allowable, unleſs one of the parties is a ſcholar or ſervant of a college, and reſident at the univerſity at the time of the ſuit commenced, and it is ſufficient if one party only is a member; but if either party is entered into a college by a trick to avoid a ſuit, his privilege ſhall not be allowed him. *Salk.* 343. *pl.* 2. *Lit. Rep.* 304. 2 *Brownl.* 74. *Barnard. Rep. K. B.* 49. *Comb.* 171. *Lit. Rep.* 41. *Hetl.* 26. *Hard.* 509. 2 *Ventr.* 106. *Galdb.* 404. *pl.* 485. 3 *Salk.* 383. *pl.* 7.

The privilege of the univerſities is not allowed againſt the privilege of the *Common Pleas*, *King's Bench*, or *Exchequer*, or in an action againſt a ſcholar and another perſon who is not privileged, nor where the contract is made out of the univerſity; nor does it extend to ſue there for the penalty of an act of parliament nor to a replevin. *Ld. Raym.* 342. *Hetl.* 26. *Lit. Rep.* 41, 304. *Cro. Eliz.* 180. *pl.* 13. *Hard.* 188. *pl.* 15, 507. *Hetl.* 28. *Brownl.* 74. 3 *Bulſtr.* 272. *Skin.* 265. *pl.* 3. *Fitzgib.* 153. *pl.* 6. 294, *pl.* 3.

In a ſuit in the *Exchequer* by writ of *quo minus*, if the plaintiff is neither accomptant nor debtor to the King, nor an officer of the court, will not *ouſt* a member of the univerſity of his privilege, if demanded before *imparlance*. *Hardr.* 504. 10 *Mod.* 128. 3 *Salk.* 383. *pl.* 8.

A *quo minus* is not a writ of privilege, nor is it ſo called, as when privileged perſons ſue in the courts where they are privileged. *Dy.* 328. *pl.* 9. 3 *Leon.* 323. *pl.* 300.

If a plaintiff was an accomptant, and entered on his account, that would alter the caſe, becauſe his attendance then would be requiſite *from day to day*.

A writ of *quo minus* is now but a common action in the *Exchequer*; and it would not lie unleſs a debt was confeſſed to the King, and then the King's debtor had a *quo minus* for the King's benefit. *Hard.* 507.

By ſtat. 11 *Geo. cap.* 22. Any perſon who hath any money owing him from any perſon who ſhall be in *White Friers*, *Savoy*, *Saliſbury-court*, *Ram-alley*, *Mitre-court*, *Fuller's Rents*, *Baldwin's Gardens*, *Mountague-cloſe*, or the *Minories*, *Mint*, *Clink*, or *Deadman's Place*, upon legal proceſs taken out againſt ſuch perſon, may require the ſheriff's of *London* and *Middleſex*, the head bailiff of the liberty and duchy of *Lancaſter*, or high-ſheriff of *Surry*, or bailiff of the borough of *Southwark*, or their officers, to take the *poſſe commitatus*, or ſuch other power as ſhall ſeem requiſite, and enter the ſaid pretended privileged places, and arreſt, and in caſe of reſiſtance or refuſal to break open the door,

door to arreſt ſuch perſon, upon any *meſne* or other proceſs, or to ſeize the goods of ſuch perſon upon any execution or extent; and if the ſheriff, *&c.* ſhall neglect with ſuch force to do their beſt endeavours for the executing ſuch proceſs, he ſhall forfeit to the plaintiff 100 *l.* And if, in the execution of ſuch proceſs, any perſon ſhall oppoſe any officer, he ſhall forfeit 50 *l.* and be by ſome juſtice of peace committed to the common gaol until the next aſſizes and gaol delivery, and ſuch offender being committed, ſhall ſuffer impriſonment and be ſet in the pillory; and if any reſcous be made of any priſoner taken by ſuch officers, within the ſaid places, the perſons making reſcous or aſſiſting, being convicted, ſhall forfeit 500 *l.* to the plaintiff; and if the perſon againſt whom ſuch recovery ſhall be had, neglect to pay the ſum recovered, with coſts, within one month after judgment and demand made, upon producing a copy of the judgment, and oath made that the money is not paid, he ſhall by order of ſuch court wherein he was convicted of ſuch reſcous, be tranſported for *ſeven years*; and if any perſon, inhabiting within any of the ſaid places, ſhall conceal any perſon who ſhall have made any reſcous, (knowing of ſuch offence), being convicted, he ſhall be tranſported for *ſeven years*, unleſs in one month he ſhall pay the plaintiff the debt for which he brought his action, with coſts. And *by ſtat.* 8 & 9 *W.* 3. *cap.* 27. *ſect.* 15. The ſame is enacted as to the *Hamlet* of *Wapping*, *Stepney* or other pretended privileged places within the bills of mortality of the cities of *London* and *Weſtminſter*.

*By ſtat.* 9 *Geo.* 1. *cap.* 23. If any perſon within *Suffolk place*, or the *Mint*, or the pretended limits thereof, knowingly oppoſe any perſon ſerving any writ, rule, or order, or other legal proceſs, or any eſcape warrant, or any juſtices of peace's warrant, or ſhall aſſault or abuſe any perſon ſerving ſuch writ, *&c.* whereby ſuch perſons ſhall receive any damage or bodily hurt, every perſon being convicted thereof ſhall be guilty of *felony*, and be tranſported.

By ſame *ſtat. ſect.* 3. On complaint to any three juſtices of peace for *Surry*, by any perſon who hath any debt owing him from any perſon reſiding in *Suffolk Place* or the *Mint*, *&c.* (ſuch creditor having legal proceſs taken out for recovery of his debt, and making oath before ſuch juſtices, that a debt exceeding 50 *l.* is juſtly due to him from the perſon againſt whom ſuch complaint ſhall be made, and that he believes ſuch perſon doth reſide in that place), it ſhall be lawful for the juſtices to iſſue their warrant to the ſheriff of *Surry*, or the bailiffs of *Southwark*, requiring them to take the *Poſſe Comitatus*, or ſuch other force as they ſhall think requiſite, and enter the ſaid *Mint*, and arreſt; and in caſe of reſiſtance or refuſal, to break open the door to arreſt ſuch perſon, upon *meſne* or other proceſs, and to ſeize goods upon any execution or *extent*; and the ſheriff, *&c.* refuſing, on ſuch warrant with ſuch force to uſe his beſt endeavours for the executing ſuch proceſs, ſhall forfeit to the plaintiff 200 *l.* and if any perſon ſhall reſiſt any officer of juſtice, or any perſon aiding ſuch officer within the *Mint*, *&c.* or ſhall reſcue any priſoner taken upon ſuch writ, *&c.* within the ſaid place, or

ſhall

ſhall there knowingly conceal any priſoner ſo taken, or any who reſcued ſuch priſoner, or ſhall be aſſiſting in reſiſting ſuch officer, or in reſcuing ſuch priſoner, or ſhall execiſe any juriſdiction, or join in making any pretended rule or ordinances, for ſupporting any pretended privilege within the ſaid place, or for oppoſing the execution of any legal proceſs, *&c.* every perſon ſo offending, being convicted thereof, on indictment or information brought within *ſix months* after the offence, ſhall be guilty of felony and tranſported. *Ibid. ſect.* 2. "And if any perſon wearing a maſk or diſguiſed habit, or having his face or body diſguiſed ſhall, within the ſaid places, join in or abet any riot there, or ſhall in any diſguiſe knowingly oppoſe the execution of any legal proceſs, or aſſault or abuſe any perſon ſerving ſuch proceſs, every ſuch perſon being convicted ſhall ſuffer death. And every perſon who ſhall aſſiſt or conceal any ſuch diſguiſed perſon, being thereof convicted, ſhall be adjudged guilty of felony, and ſhall be tranſported."

By ſame *ſtat. ſect.* 4. Every perſon who ſhall apprehend any one guilty of the offences aforeſaid, and proſecute him till convicted, ſhall receive for every ſuch offender 40 *l.* to be paid by the ſheriff of *Surry* without fee, in one month after ſuch conviction, and demand thereof made by tendering a certificate to the ſheriff or the judge before whom ſuch offender was convicted, certifying his conviction, and that he was taken by the perſon claiming the reward; and in caſe of diſpute touching the reward, the judge ſhall in the certificate direct the reward amongſt the parties, in ſuch ſhares as ſhall ſeem reaſonable; and if ſuch ſheriff ſhall die or be removed, the ſucceeding ſheriff ſhall pay it in one month; and if the ſheriff make default, he ſhall forfeit, to the perſon to whom ſuch money ſhall be due, double the ſum he ought to have paid, to be recovered with double coſts.

By ſame *ſtat. ſect.* 5. If any perſon ſhall be killed by ſuch offender in endeavouring to apprehend him, the executors, *&c.* of ſuch perſon ſo killed, (on certificate of the judge of aſſize, or the two next juſtices of peace) ſhall receive 40 *l.* from the ſheriff of the county where the fact was committed; and on failure of payment, ſuch ſheriff ſhall forfeit double the ſum, to be recovered with double coſts.

By ſame *ſtat. ſect.* 8. If any ſuch apprehender or proſecutor is guilty of any of the ſaid offences, not being in priſon for the ſame, and convicting two or more, he ſhall not only have the reward, but alſo be entitled to a pardon.

By ſame *ſtat. ſect.* 9. The charge of raiſing the *poſſe comita'us*, or other power, for enforcing the execution of this act, or *ſtat.* 8 and 9 *Wil.* 3. *c.* 27. ſhall be paid by the ſheriff.

By ſame *ſtat. cap.* 28. *Proviſoe*, That nothing in this act ſhall repeal the ſaid act, or any law in force againſt pretended privileged places, or for ſuppreſſing riots, except in caſes wherein other proviſion is made by this act.

The courts of the *Stannaries* were inſtituted for the conveniency of tinners, by charters of *Edward* 1. *ſtat.* 50. *Ed.* 3. *ſtat.* 16 *Car. cap.* 15. 4 *Inſt. c.* 45. that they might be encouraged in the making of tin, one of the ſtaple commodities of the kingdom, and therefore in *Cornwall* and *Devonſhire*, where the *ore* or *mine*, of which it is chiefly made, abounds, the workers therein are allowed the privilege of ſuing and being ſued in thoſe places.

*Tranſitory actions* between tinner and tinner, or worker and worker, though not concerning the *ſtannaries*, nor ariſing therein, if the defendant be found within the *ſtannaries*, may be brought in theſe courts, or at *common law.* 4 *Inſt. cap.* 45. *p.* 231.

If one party only be a tinner or worker, ſuch *tranſitory actions* which concern not the *ſtannaries*, nor ariſe therein, cannot be brought there; and in that caſe the defendant, by the cuſtom and uſage of that court, may plead to the juriſdiction, and ought not to be arreſted going to ſwear it, or returning, or *tarrying.* 4 *Inſt. ibid.* 2 *Rol. Rep.* 379.

By *ſtat.* 16 *Car. cap.* 15. *ſect.* 4. The juriſdiction of the *ſtannaries* is only for tin matters, and where the perſons who ſue, or one of them, be a tinner.

They have no juriſdiction of any *local action* ariſing out of the *ſtannaries.* 4 *Inſt. ibid.*

The plaintiff muſt ſhew that he was a tinner, and that the court was held within the juriſdiction of the *ſtannaries. Vide Mod. Rep. vol.* 7. *p.* 103.

The ſheriff had proceſs againſt one *Adderley*, and he took one *Adderby*; adjudged that if he was known by one name or the other, it is good; otherwiſe not. *Mo.* 407. *pl.* 548.

If the ſheriff executes a *capias*, and there is no original to warrant it, he is excuſable; but he muſt take notice at his peril of the perſon and goods that he arreſts, for he is not to examine whether the original be ſued out or not: But if he arreſts *J. S.* inſtead of *J. N.* he does it without warrant. *Dalt.* 112.

A *capias* iſſued againſt *G.* and *E. B.* affirms himſelf to be *G.* and is taken, yet this ſhall not excuſe him in an action for falſe impriſonment; the ſame law holds of a *commiſſion of rebellion. Hardr.* 323.

*Note*, Where there are two ſheriffs, the arreſt or neglect of one, is the arreſt or neglect of both. *Salk.* 152.

The perſon of the King is ſo ſacred, that no violent hands may in any caſe be laid upon him. *Stamp. de Prærog.* 42, 72, 73.

A Queen *Regent* has the ſame privileges as a King. A Queen *Conſort* is free from arreſt, for every married woman in His Majeſty's dominions (except a *feme covert*, ſeparate trader in *London*), has that privilege; which privilege the King's wife retains even after the demiſe of the crown, ſo that a *Queen dowager* is entitled thereto. 3 *Inſt.* 30. *pl.* 19.

By order of the houſe of lords on the 23 *Nov.* 1693. No petition is to be received for protecting His Majeſty's ſervants.

One *Wiltſhire*, an under-ſheriff, was impriſoned by the lord chamberlain for arreſting Sir *G. H.* ſervant to the King, upon a *Cap. utlagat.*

*Per curiam*, He may well arreſt him, for it is at the ſuit of the King himſelf, and he is ſworn to ſerve it. And by all the judges of *England*, he who procured the commitment of the underſheriff ought to pay all the charges and expences. And it is adjudged, the King's ſervant is not ſo privileged from arreſts, but that the ſheriff ought to retun his writ, unleſs he ſhews his privilege on the arreſt. *Lit. Rep.* 65. *Rep.* 46. *pl.* 108.

The court declared their opinion to be, that none of the King's ſervants *in ordinary* can be arreſted without notice firſt given to my lord chamberlain, who cannot privilege any perpetually, but in convenient time muſt either remove ſuch, or make them pay their debts; but if the bailiffs, without notice, do arreſt any ſuch, the meſſengers of my lord chamberlain cannot reſcue the priſoner by the letter of the law (the arreſt being lawful), nor by warrant, but the party is puniſhable for his contempt, for no man can know the King's ſervant by his face, but he muſt ſhew his privilege on the arreſt. *Keb. Rep.* 137. *pl* 70. *Keb. Rep.* 842. *pl.* 33. *T. Raym.* 152, 34.

The court were of opinion that the warrant of my lord chamberlain to the meſſenger, to take all perſons that detain ſuch priſoner, is a reſcue and againſt law, and is to be only againſt the plaintiff that ſued; for the bailiffs had the King's warrant to arreſt, and had no notice before the arreſt that he was the King's ſervant. 2 *Keb. Rep.* 3. *pl.* 6.

One *D.* had a debt due to him from *K.* a grand officer of the King's houſhold, and for that he could not arreſt him, he took out proceſs and *out-lawed* him; and *K.* hearing of it, cauſed the plaintiff to be impriſoned; and *D.* obtained an *habeas corpus* of the chief juſtice in the

vacation, and an *alias* and *pluries*; and on ſpeech with the King, the chief juſtice informed him in this manner (as the chief juſtice afterwards reported in open court), *viz.* *That his ſervants were free from arreſts, and therefore he ſhould not be deprived of them without his leave*; but this privilege is for the advantage of the King, but not for his ſervants. But notwithſtanding this reſolution, *D.* was arreſted again, and impriſoned, and his council moved for a *pluries habeas corpus*, and the court granted an *habeas corpus*, but not a *pluries*, becauſe none was granted before in open court. *Raym.* 152.

A warden of the *Tower* claimed privilege as a King's ſervant, but it was denied. 2 *Keb.* 485.

## *Inſtances of privilege to the Queen's ſervants in Queen Elizabeth's time.*

*Memorandum:* Report was made unto the houſe by the lord *Zouch*, of one *W. H.* an ordinary ſervant of the Queen's Majeſty, being arreſted and impriſoned on an execution by one *J. T.* ſince the beginning of the parliament. And a motion was likewiſe made by his lordſhip to know the judgment and reſolution of the houſe in this point, whether any ordinary ſervant of Her Majeſty (though he be none of the parliament) be not privileged and protected from arreſts during the time of parliament, by virtue of his ſaid ſervice to Her Majeſty; in like ſort as the ſervants of the lords of the parliament, attending the ſaid lords their maſters, are privileged and freed for that time from any arreſts of their perſons: and withal, being arreſted upon execution, whether in this caſe he may by good order of this houſe be diſcharged: which motion and doubt the lord *Z.* profeſſed that he did the rather propound, becauſe (though there were divers examples of former times touching the ſervants of the lords of parliament) the like to this concerning one of the Queen's ſervants had not been (ſo far as was remembered) brought in queſtion heretofore. And therefore it pleaſed the lords to take knowledge of this motion, and to give order that *T.* ſhould be ſent for, at whoſe ſuit the arreſt was made; and withal, that ſuch precedents as the clerk of the parliament could ſhew, ſhould be looked out, and made known to the houſe. *Vide D'Ewes's Journ.* 603. *Edit.* 1078.

The clerk of the parliament was required to ſhew forth all ſuch precedents as he had found touching the arreſts of any perſon privileged by parliament, having received directions from the lords for that purpoſe, as is before recorded; of which ſort, out of the journal book remaining in his cuſtody, there were to be found only four, *viz.*

1. *Tueſday* firſt *Dec.* in the 27th year of Queen *Elizabeth*, of *J. D.* ſervant to my lord's grace of *Canterbury*,

2. *Monday*

2. *Monday* 7th *Dec.* ſame year, of *R. F.* ſervant to the lord viſcount *Binden.*

3. *Item*, in the laſt parliament of 39 *Eliz.* 26th *Nov.* of *E. B.* ſervant to lord *Chandos*; and 8th *Dec.* of *J. Y.* the lord archbiſhop's ſervant.

4. *Item*, laſt day of *June*, 14th of the Queen, of the lord *Cromwell.*

Whereas upon complaint and declaration made to the lords *ſpiritual and temporal*, by *Henry* lord *Cromwell*, a lord of the parliament, that in a cauſe between one *J. T.* againſt the lord *Cromwell*, depending in the court of *Chancery*, in the abſence of the lord keeper of the great ſeal, at the ſuit of the ſaid *T.* the perſon of the ſaid lord *Cromwell* was, by the ſheriff of the county of *Norfolk*, attached by virtue of a writ of attachment iſſuing out of the ſaid court of *Chancery*, contrary to the ancient privilege and immunity, time out of memory, unto the lords of parliament and peers of this realm in ſuch caſe uſed and allowed, as on the behalf of the lord *Cromwell* was declared and affirmed, wherein the the ſaid lord *Cromwell*, as a lord of parliament, prayed remedy.

On a deliberate examination of this caſe in the ſaid parliament-chamber, in the preſence of the judges and others of the Queen's Majeſty's learned counſel there attendant in parliament, and on declaration of the opinions of the ſaid judges and learned counſel, there has been no matter directly produced or declared, whereby it did appear, or ſeem to the ſaid lords of parliament there aſſembled, that by the common law or cuſtom of the realm, or by any ſtatute law, or by any preeedent of the ſaid court of *Chancery*, it is warranted, that the perſon of any lord having place and voice in parliament, in the like caſe in the ſaid court of *Chancery*, before this time has been attacked; ſo as the awarding of the ſaid attachment at the ſuit of the ſaid *T.* againſt the ſaid lord *Cromwell*, for any thing as yet declared to the ſaid lords, appears to be derogatory, and prejudicial to the ancient privilege claimed to belong to the lords of this realm.

*Therefore it is ordered*, by the conſent of all the ſaid lords in parliament there aſſembled, that the perſon of the ſaid lord *Cromwell* be from henceforth diſcharged of and from the ſaid attachment. *Provided nevertheleſs*, and ſo is the mind of the ſaid lords in parliament, plainly by them with one aſſent declared, that if at any time during this parliament, there ſhall be ſhewed ſufficient matter, that by the *common law* or cuſtom of this realm, or by any ſtatute law or ſufficient precedents, the perſon of any of the lords of parliament in ſuch caſe, as this caſe of the lord *Cromwell* is, ought to be attached or attachable, then and from thenceforth it is by this order intended, that to take place which ſo ſhall be ſhewed and warranted, as aforeſaid; this

this order or any thing therein to the contrary notwithſtanding. *Ibid.* 203. *Dy.* 314, 315. *Prynne's 4th Part of Regiſter of Writs* 790. *Vol.* 3. *of Seld. Fol. Edit.* 1726. *p.* 1543.

And the ſaid precedents being accordingly preſented to the lord keeper, the ſame were read, together with certain obſervations out of a book written by *R. C.* Eſq; (intituled, the Authority and juriſdiction of the Queen's Courts) concerning the proceedings of the houſe in the like caſe of *G. F.* Gent. an ordinary ſervant of King *Henry* 8. about the 34th year of His reign.

A motion was made again by ſome of the lords, touching *W. H.* priſoner in the *Fleet*, that he might be ſent for out of the ſaid priſon, and brought into the houſe before the ſaid lords, to the end he might make relation of his cauſe, that thereon ſuch order might be ſpeedily taken with him, as ſhould by the court be found meet, and agreeable to the privilege of the ſaid court. On which motion it was debated, by what courſe the ſaid *H.* ſhould be brought out of the *Fleet*, being then in execution, whether by warrant to be directed from the lords to the keeper, requiring him to grant forth a writ in Her Majeſty's name for the bringing of the ſaid *H.* from thence, or by the immediate direction and order from the houſe to the gentleman uſher or ſerjeant at arms, without any ſuch writ. Which queſtion being put by the *lord keeper*, *It was reſolved and ordered*, by the general conſent of the houſe, that it ſhould be done by immediate direction and order from the houſe, without any ſuch writ, as aforeſaid. And it was accordingly ordered, that the ſaid *W. H.* ſhould be ſent for, and brought before the lords by the gentleman uſher into the ſaid houſe of parliament. *Ibid.*

The ſaid *W. H.* being brought from the *Fleet* into the houſe before the lords, and having made (as he was required to do) relation of his arreſt, and of the time, and parties that arreſted him; declaring that he was arreſted by the under-ſheriff of the county of *Surry*, and others aſſiſting him, on *Saturday* before the beginning of the parliament (which began on the *Tueſday* following), and that it was known to the ſaid under-ſheriff that he was Her Majeſty's ordinary ſervant; and moreover, that he thought *T.* was not privy to his arreſt at that time, contrary to the privilege of that houſe. On the offer, and petion of the ſaid *W. H.* himſelf, to pay the principal debt of 50 *l.* it was reſolved and ordered by the lords, that the ſaid *W. H.* ſhould enter into ſufficient (*bond*) to abide the order and judgment of the earl of *Cumberland*, lord biſhop of *London*, and the lord *Zouch*, for ſuch ſatisfaction to be made of the debt of 50 *l.* and any coſts and charges as by the ſaid lords ſhould be thought fit, (the bond to be taken to the ſaid lords) and thereupon be diſcharged out of priſon and out of execution: And likewiſe that the warden of the *Fleet* ſhould be free from any trouble, damage

or

or moleſtation, for diſcharge of the ſaid *W. H. It was likewiſe ordered* by the court, that the under-ſheriff, and others that did arreſt or aſſiſt the arreſt of the ſaid *W. H.* ſhall be ſent for to appear before the lords in their houſe. *Ibid.* 605.

The under-ſheriff of the county of *Surry*, that arreſted *W. H.* was brought into the houſe to anſwer for the ſame, and by order of the houſe committed to the priſon of the *Fleet*. *Ibid.* 606.

*It was ordered* by the houſe, on the humble petition of *W. H.* underſheriff of the county of *Surry*, that he ſhould be enlarged and ſet at liberty out of the priſon of the *Fleet*, where he was lately committed for arreſting *W. H.* Her Majeſty's ſervant. *Ibid.*

The lords were informed by the earl of *Worceſter* of an arreſt made of the perſon of *R. T. S.* one of His Majeſty's heralds at arms in ordinary, at the ſuit of one *M. F.* of *London*, whereon *It was ordered* by the court, that the ſerjeant at arms ſhould be ſent for the ſaid *M. F.* and for *W. S.* and *W. L.* that made the arreſt, and ſhould bring them before the lords into the upper houſe, and that the ſaid ſervant ſhould alſo bring *R. T.* himſelf. *Ibid.*

See further adjudications on the privilege of the King's ſervants, in *Philipp's Regale Neceſſarium.*

It appears that none of the royal family are privileged from arreſts merely as ſuch, nor princes of the blood or peers of foreign ſtates, and conſequently none of their ſervants. See 7 *Co.* 15. *a. b:* 16. *a.* 2 *Inſt.* 48. 3 *Inſt.* 30. *pl.* 19.

By *ſtat.* 7 *Ann. c.* 12. *ſect.* 3. All proceſs, whereby the perſon of any ambaſſador or public miniſter of any foreign prince or ſtate, or the domeſtic ſervants of any ſuch ambaſſador, *&c.* may be arreſted, or his goods diſtrained, ſhall be adjudged void.

By ſame *ſtat. ſect.* 4. The perſons ſuing forth ſuch proceſs, their attornies and ſolicitors, and the officers executing the ſame, being convicted thereof by the confeſſion of the party, or by the oath of one witneſs, before the *lord chancellor* and the *chief juſtices*, or any two of them, ſhall be deemed violators of the laws of nations, and ſhall ſuffer ſuch penalties and corporal puniſhment as they, or any two of them, ſhall judge fit.

*Sect.* 5. No merchant or trader, within the deſcription of any of the ſtatutes of bankrupts, putting himſelf into the ſervice of any ambaſſador, *&c.* ſhall have any benefit by this act. And no perſon ſhall be proceeded againſt, as having arreſted the ſervant of an ambaſſador, *&c.* unleſs the name of ſuch ſervant be regiſtered in the ſecretaries

taries office, and tranſmitted to the ſheriffs of *London* and *Middleſex*; who muſt hang it in ſome public place in their office.

*Sect.* 6. The act to be taken as a public act. Judges, *&c.* to take notice of it, without pleading it ſpecially. Sheriffs, bailiffs, *&c.* concerned in the execution of proceſs, to regard it at their peril.

On motion to ſet aſide an arreſt, and to vacate a bail-bond given by the plaintiff, who was a domeſtic of the duke of *Holſtein*, reſident here, he having been regiſtered, *&c.* purſuant to the above ſtatute, the ſame was granted. *Vide Mod. Rep. vol. p.* 288.

On motion to diſcharge the defendant out of execution, as being an ambaſſador's ſervant, *viz.* his *Engliſh* ſecretary. *It was objected*, he did not lie in the houſe; and the words of the above act are, *domeſtick* ſervants. *Per curiam:* The nature of his employment requires his attendance at the houſe, and it is not neceſſary he ſhould lie there. And the general words, "All writs and proceſſes ſhall be void," take in this caſe, and therefore the execution muſt be ſet aſide. *Vide Stra. vol.* 2. *p.* 737. *Raym. vol.* 2. *p.* 1524.

On motion to ſuperſede a proceſs againſt the defendant, as being in the ſervice of a foreign ambaſſador; The court held, that to be a privileged ſervant within the act, it is not required that the party actually live in the ambaſſadors houſe. But it is not enough, that the party be regiſtered in the ſecretary's office as a ſervant; but when he comes for the benefit of this act, he muſt ſhew the nature of his ſervice, that the court may judge whether he be a *domeſtick* ſervant, within the meaning of the act of parliament. In this caſe it was objected againſt the defendant, that he was a trader, and ſo expreſly excluded from privilege by the ſtatute: to which Mr. *Solicitor General* who was counſel for the defendant, anſwered, that by traders within this act, muſt be underſtood, ſuch as may have the benefit of the ſtatutes concerning bankrupts, which infants are not entitled to, as it was determined in one (*bond*) *W.*'s caſe: and that the defendant could prove he had exerciſed no trade ſince full age. *Raymond* chief juſtice aſked, whether there were not ſome other circumſtances in that caſe of *W.* on which the reſolution there turned; but his lordſhip ſaid he gave no opinion in that matter. *Vide Fitz-Gib.* 200. *pl.* 12. 2 *Stra.* 797.

A defendant moved to be diſcharged as *domeſtick* or *menial* ſervant (which were the words of his affidavit) of baron *Hopman*, envoy from the duke of *Mecklenburgh*, and obtained a rule to ſhew cauſe. The plaintiff ſhewed for cauſe, that the defendant had an annuity of 200 *l.* year, and that he was a juſtice for *Middleſex*, ſo that it was not likely he could act as the envoy's *domeſtick* ſervant; and inſiſted that the words of the envoy's certificate, produced by the defendant, were *menial* ſervant only, which is not within the act, the words of the act being *domeſtick* ſervant. *Per curiam:* The word *menial* is not explained

plained by our law, *domeſtick* ſervant are the words of the act, and it does not appear that the defendant was ſuch. A *menial* ſervant may be employed out of the houſe or houſhold affairs, a *domeſtick* ſervant is employed in or about the houſe only. A perſon living as a clerk, is no *domeſtick* ſervant. In this caſe the defendant did not appear to have received any wages. *Vide Barnes's Notes* 264.

The defendant moved to be diſcharged out of execution, being ſteward of the houſhold to baron *Bourk*, a *foreign envoy*; and obtained a rule to ſhew cauſe, which was afterwards diſcharged, on hearing council on both ſides; It appearing to the court, that the defendant was a trader, that he reſided at his own houſe in the *Old Palace Yard*, *Weſtminſter*, and that the envoy was at *Hanover* at the time of the arreſt. *Ibid.*

The defendant being arreſted at the plaintiff's ſuit, moved to be diſcharged out of cuſtody, on *affidavit* that he was a courier employed in the ſervice of Sir *T. G.* envoy from the King of *Spain*, and (during the receſs from journies, wherein he was frequently employed by the envoy) did eat at his houſe among his ſervants, and was paid wages by him. *It was inſiſted* for the plaintiff, that Sir *T. G.* was not a public miniſter within the act of parliament, but only an agent for the court of *Spain*, to treat with the *South Sea* company: that admitting him to be a public miniſter, a courier or meſſenger, who is paid for each journey according to his deſert, and not a certain ſum for wages by the year, is not a *domeſtick* ſervant. It fully appeared, by *affidavits* produced on behalf of the plaintiff, that the defendant was a trader, and conſequently not entitled to the benefit of the act of parliament. The court therefore ſet aſide the rule to ſhew cauſe. *Ibid.* 272.

In this caſe, the defendant was ſecretary to the reſident from *Venice*, but yet was taken in execution. Accordingly, on *affidavit* from the reſident that he was ſo, and that his name was entered in the duke of *Newcaſtle*'s office, though it was not tranſmitted over to the ſheriff of *Middleſex*, at the time he was arreſted, tho' it was a few days after; and on *affidavit* that he offered to ſhew his teſtimonial to the officer, and that he really exerciſed the office, the court diſcharged him, notice being given of the motion. Where a perſon does not execute the office, which he has his teſtimonial for, but only gets himſelf entered in the liſt to have the benefit of a protection, they will not ſuffer it. *Vide Barnard. Rep. in K. B.* 79.

On a rule to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody, for being ſervant to an ambaſſador; it was ſaid, that the words of the *affidavit*, upon which the rule was made, only were, that he was hired in the quality of *domeſtick* ſervant to the ambaſſador, and did what ſervice he required of him. The council objected, that it was not ſworn, that he actually ſerved the ambaſſa-

dor in the capacity he was hired in. And beſides, the defendant has ſtiled himſelf apothecary in the *affidavit*; and by an expreſs clauſe in the ſtat. which gives protection to ambaſſadors ſervants, no one is entitled to ſuch protection who is liable to an act of *bankruptcy*. The *Attorney General* on the other ſide, ſaid, that by the defendant's ſtiling himſelf apothecary, it does not appear, that he was any thing more than a journeyman, and in ſuch caſe he would not be liable to become a bankrupt: and as to the other objection, he ſubmitted it, that the *affidavit* was certain enough. *Per Curiam* the defendant ſhould have ſworn, that he actually ſerved in the capacity he was hired; and therefore the rule muſt be diſcharged. *Ibid.* 401.

The defendant was arreſted and held to *ſpecial bail*, and moved to be diſcharged, having a certificate from the count *De Broglio*, the *French* ambaſſador, of his being maſter of the horſe; it appeared the defendant was a trader, and ſuch a one as a commiſſion of bankruptcy might have iſſued againſt; therefore the court diſcharged the rule to ſhew cauſe. *Rep. and Caſ. of Pract. C. P.* 65.

A perſon was protected by baron *Hoffman*, a public miniſter, and the protection was regiſtred in the ſheriffs office, according to the act of parliament. A *capias ad reſpondend'* was delivered to the ſheriff of *Dorſetſhire*, who durſt not execute it by reaſon of the protection, and the penalty in the act. The plaintiff ſerved the ſheriff with a treaſury rule to return the writ, which rule was diſcharged by the court. 2 *Barnes* 332.

The nobility of *England* are privileged from arreſts.

1. As peers of the realm; with whom we ſhall ſpeak of biſhops and peereſſes.

2. Lords of parliament.

All peers, without any diſtinction as to degree or rank, are entitled to privilege, for they are equally obliged to attend the ſervice of the public; and the law intends them to be aſſiſting the King with their counſel for the common wealth, and to keep the realm in ſafety with their proweſs and valour; and are always ſuppoſed amenable, and to have ſufficient property to anſwer in ſuits and actions brought againſt them, and on theſe grounds, are not to be arreſted or moleſted in their perſons. 4 *Bac. Abr.* 228, 231. 2 Ld. *Raym.* 1247. 4 *Inſt.* 24. *Styl.* 222, 253. *Mo.* 767. *Vol.* 3. of *Selden's* works, *fol. edit.* 1726. *p.* 14, 78. *Dy.* 60. *a. in marg. Mo.* 778. *pl.* 1080. *Noy* 102. *Stamf. Cl. Cr.* 38. (A.) *Hawk. Pl. Cr.* 59. *cap.* 22. *ſect.* 2. See 4 *Inſt.* 49. 9 *Co.* 49. *a. Ibid.* 68. *Jenk. Cent.* 107. *Ca.* 6. *Hob.* 61. 12 *Co.* 96. 10 *Co.* 78. *b.*

The

The ſon and heir apparent of a nobleman, is not privileged from arreſts; but it ſeems that an infant peer is, his perſon being held ſacred. 3 *Inſt.* 33. *pl.* 19.

A motion was made on the behalf of the lord *B.* for a *Superſedeas* to a *Latitat*, which was iſſued out of the court of *B. R.* againſt him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment in this court againſt my lord, and the letters patent of his creation, and an *affidavit* that my lord was the ſame perſon in the record of the judgment; and it was alſo pretended, that if my lord ſhould put in bail, he would be *eſtopped* to plead his peerage; but the court denied the motion, and the *Chief Juſtice* ſaid they could not take notice that this *C. K.* is earl of *B.* that there was a difference between this caſe and the caſe of a peer that had ſat in the Houſe of Lords. If my lord had ever been ſummoned to parliament, and had a writ to ſhew, and there were no diſpute about the identity of the perſon, it would have been reaſonable to have granted a *ſuperſedeas*. *Vide Ld. Raym. vol.* 2. *p.* 1247.

Though it has been much controverted whether biſhops were peers of the realm, yet it ſeems pretty well ſettled at this day that they are, and therefore no proceſs in a *civil action* is to be awarded againſt their bodies. 3. *Seld.* 1538, 1539, 1589, 1697.

A peereſs by birth is entitled to privilege; ſo is a peereſs by marriage, and that as well during the *coverture* as after; a peereſs by marriage, loſes her dignity by marrying a commoner, and after ſuch marriage ſhe ſhall not be allowed her privilege of peerage. 6 *Co.* 53. 2 *Inſt.* 50. *Co. Lit.* 16. By order of the Houſe of Lords of 21 *February* 1792. *Dy.* 79 *pl.* 51. 2 *Hawk. Pl. Cr. cap.* 44. *ſect.* 11. *p.* 423.

The widows of peers are to have the privilege of peers not to be arreſted. And it was ſo adjudged in parliament, 19 *Dec.* 1676. 2 *Chan. Caſ.* 224. *Eq. Caſ. Abr.* 349. (A). *pl.* 2. *edit.* 1756. *Styl.* 222. 2 *Sid.* 31.

*Rolle Chief Juſtice* ſaid, It was a queſtion whether a counteſs by patent only for her life, be privilged from arreſts or no. *Styl.* 234, 254. *S. C.*. held not allowable, but adjourned.

A bill of *Middleſex* was iſſued out of *K. B.* by an attorney of the court, againſt the counteſs of *H.* which was diſcharged by *ſuperſedeas*, without pleading; becauſe it appeared by the record that ſhe was a peereſs. *Ventr.* 298.

The privilege of the Houſe of Lords is, that no lord of parliament, during the ſitting of the parliament, or within the uſual times of pri-

vilege, ſhall be impriſoned or reſtrained, without ſentence or order of the Houſe, (unleſs for *treaſon* or *felony*, or for refuſing to give *ſecurity for the peace.*) By order of 18 *April* 1626. 4 *Inſt.* 25. *Prynne's* 4th *Part of Reg. of Writs* 701, 702. *Comb.* 49.

The privilege of parliament, according to the law of parliament, is of a very extenſive nature. 4 *Bac. Abr.* 229. 4 *Inſt.* 50, 51. *Prynne's* 4 *Inſt.* 16. 13 *Co.* 63, 64. 2 *Ld. Raym.* 1111.

By *ſtat.* 13 *Geo.* 2. *cap.* 34. No privilege of parliament ſhall be allowed to any perſon whatſoever, againſt whom any proſecution or proceeding ſhall be commenced, or had, for keeping of any public or common gaming-houſe, or any houſe, room, or place, for playing at any game prohibited by this or any other act now in being againſt exceſſive and deceitful gaming.

All the *menial* ſervants of lords of parliament, and thoſe of their family, and alſo thoſe employed neceſſarily and properly about their eſtates as well as their perſons, are privileged. This freedom begins from the date of the writ of ſummons in the beginning of every parliament, and continues *twenty days* before and after every ſeſſion. *Ibid.* 28 *May* 1624. 2 *Show. Rep.* 84.

By an order of the Houſe of Lords of 22 *June* 1715, *It was reſolved*, That every peer ſhould, on his honour, certify to the Houſe, that the perſons protected were within the privilege of the Houſe; and ſhould by letter acquaint the party, arreſting ſuch privileged perſon, with the ſame.

By an order 24 *Jan.* 1696, in the ſame Houſe, *It was reſolved*, That no common attorney or ſolicitor, though employed by any peer, ſhould have the privilege of this Houſe.

An attorney was taken in execution on a *capias ad ſatisfaciendum*; but on a letter under the hand and ſeal of the lord *Say and Seal*, the ſheriff diſcharged him as ſteward to his lordſhip; a rule was obtained at the ſide-bar for the return of the writ; and now, on a motion in court to diſcharge this rule, it was urged in behalf of the ſheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the proceſs; and that therefore the court ought not to inſiſt upon a return, as the ſheriff could not juſtify the detention of the defendant, but under peril of bringing himſelf and the plaintiff under the cenſure of the Houſe of Peers: on conſideration of the above mentioned orders, and on conſidering the nature of this caſe, that the plaintiff was within the ordinary juſtice of the court entitled to a return of his writ; that without ſuch return he might be debarred from any further execution; but principally from the great inconvenience that might ariſe by allowing attornies, who are officers to the courts in which they reſpectively practiſe, and therefore amenable

nable to those courts, the court gave the plaintiff liberty to proceed against the sheriff, but gave him time till next term to make his return. *Vide Stra. vol.* 2. *p.* 1065.

*J. S.* brought an action for rent against *H.* who pleaded that he was tenant and servant to lord *M.* and prayed his *writ of privilege* might be allowed; the plaintiff demurred. *It was argued*, that the matter of plea was against the common and statute law; but by *Rolle Chief Justice* you ought not to argue generally against the privilege of parliament; every court has its privilege; I conceive a writ of privilege belongs to a parliament man, so far as to protect his lands and estate, and you have admitted his privilege by your demurrer. *Stil.* 139, 167. Order, 8 *May* 1628. Sir *William Jones* 155.

A defendant, after a *general imparlance*, pleaded, that he was a servant to a peer, *viz.* the earl of *P.* and by *North C. J.* it is not receivable, for it is the privilege of the master, and not the servant: but the defendant ought to sue out his *writ of privilege*, for perhaps his master will not protect him; and if he will not, he is then left to answer. This is like to the case of a *counsellor*, where it is the privilege of the client that he shall not be compelled to discover the secrets of the client; but if the client be willing, the court will compel the counsel to discover what he knows, which serjeant *M.* said was his father's case before the Lord *C.* in the court of *Wards*. *North C J.* said, as it was a matter of great consequence, he would advise with the *Lord Chancellor* and the rest of the judges, what used to be done in such cases. Afterwards it was moved again, and *North C. J.* said it was moved in the House of Lords, and that they had left it to the judges to do according to law; and therefore the plea was rejected. 4 *Bac. Abr.* 233. 3 *Seld.* 1478.

The peers of *Scotland* had no privileges in this kingdom, before the *union*; but now, by the 23d *article of the union*, viz. *Stat.* 5 *Ann. c.* 8. The *sixteen* peers shall have all the privileges of the peers of parliament of *Great Britain*; also all the rest of the peers of *Scotland* shall have all the privileges of the peerage of *England*, except only that of sitting and voting in parliament, and the privileges depending thereupon. *Stat. Vide Peere Will.* 513. 9 *Co.* 117.

The lord *M.* who was a *Scotch* peer, but not one of those who sat in parliament, being arrested, moved the court of *Common Pleas* to be discharged, as being entitled by the *act of union* to all the privileges of a peer of *Great Britain*, *except* a seat in parliament; and prayed an *attachment* against the bailiff, upon which a rule was made to shew cause. And thereon the bailiff made an *affidavit*, that when he arrested the said lord, he was so mean in his apparel, as having on a worn out suit of cloaths and a dirty shirt, and but *six-pence* in his pocket, he could not suppose him to be a peer of *Great Britain*; and therefore through inadvertency arrested him. The court thereupon discharged the lord, and made the bailiff ask pardon. *Vide Forteſc. Rep.* 165.

A lord

A lord of *Ireland* has not any other privilege in this kingdom than a common perſon. 2 *Inſt.* 48. 3 *Inſt.* 30.

Privilege of parliament is only a *temporary* immunity, which our Kings grant to the members of parliament and their neceſſary attendants, during parliamentary aſſemblies, againſt arreſts and impriſonments of their perſons, cuſtomarily and humbly demanded by the ſpeaker of the *Common* houſe from all our Kings, at the beginning of every parliament, when preſented by the Houſe, in their own and the members behalf, and then freely and graciouſly granted to them by the King, as a matter of cuſtom and ancient right. *Prynne's 4th Part of Regiſtry of Writs* 624.

Mr. *O.* who was elected ſpeaker in 1556, neglected, on his being preſented to Queen *Elizabeth*, to demand this freedom from arreſts; and it was reſolved that ſuch demand was not neceſſary, and the privilege ſubſiſted notwithſtanding. *Sir Robert Atkins's Treatiſe of the Power of Parliament* 40.

For the proceedings of the Houſe of Commons, touching the privilege of their members, ſee the caſe of *F. N.* Eſq; one of the burgeſſes for the borough of *G.* in the county of *L.* who was arreſted on a *Sunday* on an execution; *D'Ewes's Journal* 518. and of *G.* a burgeſs of the Houſe of Commons, a priſoner in the *Fleet*, who was reſtored to the Houſe on condition that on prorogation, or diſſolution of the then ſeſſion of parliament, he might be a priſoner again. *Ibid.* 123.

Aſſiſtants, officers of both houſes of parliament, who repair to parliament by the King's writ of ſummons, or on legal elections, returns, and continually attend therein to diſcharge their duties during the whole ſeſſions of parliament, till its diſſolution, and that during their ſtay, coming, and return from it to their homes, are privileged from arreſts. *Prynne's 4th Part of Reg. of Writs.* 690.

Alſo the ſerjeant at arms, and door-keepers, clerks, and ſuch like. *Cromp. Juriſdict. of Courts* 11.

Not the wives, children, kinſmen, ſtewards of courts, fee'd counſellors, and attornies. *Noy's Rep.* 68. See order of the Houſe of Commons of *Thurſday*, 16 *July* 1663.

Solicitors, proctors, ſcriveners, factors, phyſicians, apothecaries, goldſmiths, mercers, haberdaſhers, butchers, poulterers, vintners, ſadlers, taylors, ſhoe-makers, carpenters, or other tradeſmen, relating to members, or officers who are not *bona fide* (really) their *menial* ſervants, actually coming with, and attending upon them as their neceſſary ſervants, during the parliament's ſitting, without fraud or colluſion. *Prynne's 4th Part of Reg. of Writs* 692. *D'Ewe's Journal* 83, 84,

83, 84, 85, 249, 629. *Freeholder's Grand Inqueſt* 54, 55. *Prynne's Plea for the Lords* 409. *Elſyng's Parliament* 199, 200. 4 *Prynne's Reg of Writs* 798. See the orders of the Houſe of Commons of *Thurſday* 15 *Nov.* 1661, (this order was revived 18 *Feb.* 1662, and 9 *Apr.* 1670), of *Thurſday* 28 *Nov.* 1661, (revived 9 *Apr.* and 9 *Dec.* 1670), of *Saturday* 28 *March* 1663, of *Thurſday* 20 *Decem.* 1666. See *D'Ewe's Journal* 249, 254, 258, 373.

A member of parliament ſhall have privilege of parliament, not only for his ſervants, but for his horſes, *&c.* or other goods diſtrainable. 4 *Inſt.* 24.

Only *menial* ſervants, or one who attended on the perſon of a knight or burgeſs of parliament, is free from arreſt. *March* 93. *pl.* 157. Order of the Houſe of Commons of 20 *November* 1621.

No bailiffs, carters, ſhepherds, ſtewards, grooms, or any other *menial* ſervants in their country houſes, who attend not daily on their perſons, but are otherwiſe employed; nor yet all their *menial* ſervants who come and ſtay with them at their lodgings, unleſs they be neceſſary attendants, and convenient for their qualities: hence it has been queſtioned, whether the ſervants of noblemen, judges officers, as cooks, butlers, grooms, who attend not on them in the parliament houſe or courts of juſtice, (as their gentlemen, ſecretaries, clerks, pages, and coachmen do), ſhould have any privilege? But becauſe ſuch honourable perſons of quality cannot conveniently or honourably reſort to parliament or terms, without cooks to dreſs their meat for their neceſſary repaſts, and butlers and grooms for their horſes, on that acount have been allowed privilege; yet the cook of the *Temple* was allowed his privilege, 28 *H.* 8. when Sir *T. A.* was ſpeaker, becauſe he dreſſed his meat for his table as ſpeaker: but I conceive the cooks of the inns of court or chancery, who dreſs their public commons in the hall, ſhall not have privilege of parliament, although the ſpeaker, or ſome members of either houſe eat their commons in the hall, which theſe cooks dreſs for them, becauſe they are not particular *menial* ſervants, but the whole ſociety's, on which ſcore they dreſs their commons, elſe every other tavern, cook, victualler in and about *Weſtminſter*, who dreſs meat for the members, and thoſe that lodge them, ſhould have privilege of parliament; yea, every waterman, hackney-coachman, ſedan-man, that row or carry them to and from the parliament, though not their *menial* ſervants, who never had, nor ought to have privilege. *Prynne's 4th Part of Reg. of Writs* 692, 693. *Bro. Abr. tit. Privilege, fol.* 152. *b. pl.* 6. 153. *b. pl.* 16. 154. *b. pl.* 42. *Fitz. Abr. tit. Privilege, fol.* 15. *b. pl.* 20. Mr. *John Doderige's Preface before the Antiquity of Parliaments of England. Holinſhead's Chronicle, vol.* 3. *p.* 1084. *Crompton's Juriſdiction of Courts, fol.* 10. *b. Prynne's Plea for the Lords* 405.

In

In an action of *debt*, the defendant pleads he was ſervant to a member of parliament, and *therefore ought not to be taken or arreſted:* The plaintiff prays judgement, and *becauſe the barons are of opinion there is ſuch a privilege, that the great men*, &c. *and their ſervants ought not to be taken, or arreſted; but that there does not appear any privilege that they ought not to be impleaded, therefore he muſt anſwer over.* Mod. 146.

By *Dyer*. If a man be condemned in *debt* or *treſpaſs*, and is choſen one of the burgeſſes or knights of parliament, and after is taken in excution, he cannot have the privilege of parliament; and ſo it was held by the ſages of the law in the caſe of one *F.* in the time of *Henry* VIII. and though the privilege at this time was allowed him, it was unjuſt. *Mo.* 57. *pl.* 163. *Dal.* 58. *pl.* 7. *Jenk. Cent.* 118. *Ca.* 35.

*T. F.* being elected a burgeſs of the parliament, *two hours* after his election, and before the return of the writ to the ſheriff, with the indenture of his election, the ſaid ſheriff arreſted him on a *writ of capias utlegatum*, in an *outlawry*, after judgment, at the *Queen's ſuit*, and then his indenture was returned to the ſheriff. On all which matters there aroſe two queſtions; *firſt*, whether the ſaid Mr. *F.* was a member of the houſe? and *ſecondly*, admitting that, yet, whether he ought to have privilege? Which ſaid matters having been much debated, received now the judgment of the houſe, which was, that *T. F.* was by his election a member thereof, yet that he ought not to have privilege in *three reſpects: Firſt*, becauſe he was taken in execution before the return of the indenture of his election. *Secondly*, becauſe he had been outlawed at the *Queen's ſuit*, and was now taken in execution for her Majeſty's debt. *Thirdly*, and *laſtly*, in regard that he was ſo taken by the ſheriff, neither *during the ſeſſion of parliament*, nor *in going* or *returning*. *D'Ewe's Journal* 518. *Mo.* 340. *pl.* 461. *Prynne's 4th Part of Reg. of Writs* 646.

In the above caſe, as reported by Mr. ſerjeant *M. C.* ſpeaker cited the caſe of *T.* ſpeaker, *4th Part of Prynne's Reg. of Writs* 678. who was in the time of adjournment taken in execution at the ſuit of *Y.* and reſolved on the meeting of parliament, that the ſpeaker ſhould not have his privilege; but they elected another ſpeaker. *Mo.* 340. *pl.* 461. *Prynne's Plea for the Lords* 397, 398. *Exact Abridgment of Records in the Tower* 651. *Elſing.* 194, 195, 196.

Divers perſons *outlawed*, as well before judgment as after, were choſen knights and burgeſſes of the parliament, held in the 35th year of the reign of Queen *Elizabeth*; and the queſtion was, Whether ſuch perſons ought to be knights and burgeſſes of parliament or not? All the judges held that they ought not, and ſuch *outlawed* perſons might be arreſted by *a capias utlegatum*, notwithſtanding the privilege of parliament; and thereupon the Queen commanded, that no ſuch perſons ſhould be ſuffered in the parliament houſe. *Ander.* 293. *Ca.* 301.

By *ſtat.* 13 *Geo.* 2. *cap.* 54 No privilege of parliament ſhall be allowed to any perſon whatſoever, againſt whom any proſecution or proceeding ſhall be commenced or had, for keeping any public or common gaming-houſe, or any houſe, room, or place, for playing at any game prohibited by this or any other act now in being, againſt exceſſive or deceitful gaming.

No member of the houſe of commons, acting as a public officer, has any privilege of parliament, touching any matter done in execution of his office. *See* Order of the *Houſe of Commons* of *Monday* 27 *Nov.* 1699. and ſtat. 2 & 3 *Ann. c.* 18. *ſect.* 1.

No co-partner in any trade or undertaking is entitled to privilege of parliament in reſpect to any matter relating to ſuch co-partnerſhip. By order of the *Houſe of Commons* of *Friday* 9 *April* 1742.

Privilege of parliament does not extend to *high treaſon*, *felony*, *breach of the peace*, or *ſurety of the peace*. 4 *Inſt.* 25. *Prynne's 4th part of the Reg. of Writs*, 681, 700, 702, *to* 716, 731, 737, 813, 814, 1202, 1203, *&c. Comb.* 49.

By *ſtat.* 8 *Hen.* 6 *cap.* 1. "Foraſmuch as the prelates and clergy of the realm of *England*, called to the convocation, oftentimes and commonly be arreſted, moleſted, and inquieted; our ſaid Lord the King, willing graciouſly in this caſe to provide for the ſecurity and quietneſs of the ſaid prelates and clergy, at the ſupplication of the ſame prelates and clergy, and by the aſſent of the great men and commons aforeſaid, hath ordained and ſtatuted, that all the clergy from henceforth to be called to the convocation by the King's writ, and their ſervants and familiars, ſhall for ever hereafter fully uſe and enjoy ſuch liberty or defence in coming, tarrying, and returning, as the great men and commonalty of the realm of *England*, called or to be called to the King's parliament, do enjoy, or were wont to enjoy, or in time to come ought to enjoy."

The judges, their neceſſary ſervants, goods, and chattels, ſhall not be arreſted or taken, but in caſes of *treaſon or felony*. *Cromp. Juriſdict. of Courts* 11. 2 *Sid.* 31.

It has been held that judges clerks may be arreſted, but you muſt proceed againſt them by original. *Raym.* 399.

The lord mayor of the city of *London* is previleged from all actions during his mayoralty, in regard of his office, except it be for *felony or treaſon*, or *actions which concern freehold*; this is, that he may not be hindered in the government of the city, which being the metropolis of the nation, is of higher concernment, in reſpect of the public, than any man's particular intereſt. 2 *Lil. Abr.* 456.

By *ſtat.* 50 *Edw.* 3. *cap.* 5. *Reciting that* "Becauſe complaint is made to our Lord the King, by the clergy of the realm of *England*, that as well divers prieſts bearing the ſweet body of our Lord *Jeſus Chriſt* to ſick people, and their clerks with them, as otherwiſe, divers other perſons of the holy church, while they attend divine ſervice in churches, church-yards, and other places dedicated to God, be ſundry times taken and arreſted by authority royal, and commandment of other *temporal* Lords, in offence of God, and of the liberties of the holy church, and alſo in diſturbance of divine ſervice aforeſaid: the ſame our Lord the King, who would be ſore diſpleaſed if any did in ſuch manner, will and granteth and defendeth on grevious forfeiture, that none do the ſame from henceforth, ſo that colluſion or feigned cauſe be not found in any of the ſaid perſons of holy church in this behalf."

By *ſtat.* 1 *Rich.* 2. *cap.* 15. *Reciting that* "Becauſe prelates do complain that as well beneficed perſons of holy church, as others, be arreſted and drawn out, as well of cathedral churches, as of other churches and their church-yards, and ſometimes while they attended to divine ſervice, and alſo in other places, although they be bearing the body of our Lord *Jeſus Chriſt* to ſick perſons, and ſo arreſted and drawn out, be bound and brought to priſon againſt the liberty of holy church; *It is ordained* that if any miniſter of the King or others, do arreſt any perſon of holy church by ſuch manner, and thereof be duly convicted, he ſhall have impriſonment, and then be ranſomed at the King's will, and make agreeable to the parties ſo arreſted: *provided* that the people of holy church ſhall not hold themſelves within the churches by fraud or colluſion.

*Lord Coke ſays*, "That he ſaw a report in the time of Queen *Mary*, on the aforeſaid ſtatutes, where it was held, that they are but an affirmance of the *common law*, and in maintenance of the liberties of holy church, as appears by the preamble of the ſame ſtatutes; and that *going*, *returning*, and *ſtaying*, to celebrate divine ſervice, the prieſt ought not to be arreſted, nor any who aid in it." 12 *Co.* 99. *Gibſon's Codex* 10, *no Watſon's Clergyman'. Law, chap.* 34. *p.* 344.

If an arreſt be made contrary to the ſaid ſtatutes, and the perſon arreſting does preſently diſcharge the perſon arreſted, on pretence of ignorance, *&c.* this will not excuſe the contempt in making the arreſt. *Cro. Car.* 602.

It is to be noted, that the aforeſaid ſtatutes extend both to prieſts and laymen. 2 *Brownl. Rep.* 301. 2 *Bulſt.* 72. *Chro. Jac.*

However, if ſuch arreſt be made, the arreſt is good, ſo that if a *reſcous* be made, and thereby any perſon killed, the killing is murder 2 *Bulſt.*

2 *Bulſt.* 72. And note that that one Dr. *B.* being arreſted and taken in execution on a *Sunday* in the church-yard or porch, in coming from divine ſervice, and it appearing to the court that the ſaid *B.* had abſconded ſome time before, the court would not diſcharge him from execution, nor puniſh the bailiffs; but had he not ſo abſconded, they then would have puniſhed the contempt in the bailiffs. 2 *Keb.* 777. *pl.* 1.

It ſeems agreed, that the privilege of the court of *Common Pleas*, which *Serjeants* claim for themſelves, their clerks, and ſervants, extends only to inferior courts, not to the courts in *Weſtminſter Hall*; and that they may be ſued in any of theſe, becauſe they are not confined to that court alone, but may practice in any other court. *Cro. Car.* 84. 95. 3 *Keb.* 424. *pl.* 23. 2 *Lev.* 129. *Freem.* 389. 2 *Mod.* 206. *Raym.* 399. 4 *Bac. Abr.* 221. *North's Life of Lord Keeper Guildford* 69, 152.

It does not appear that gentlemen at the bar are privileged from being arreſted, but there are ſeveral inſtances in which they have been held to bail, and never any queſtion was made of the legality of ſuch proceedings.

The officers, miniſters, and clerks of the courts in *Weſtminſter Hall*, are allowed particular privileges in reſpect of their neceſſary attendance on thoſe courts; they are regularly to ſue and be ſued in the courts they reſpectively belong to, and cannot, *except* in certain caſes, be impleaded elſewhere; which privilege ariſes from a ſuppoſition of law, that the court, or their client's cauſes, would ſuffer by being drawn into any other court than that in which their perſonal attendance is required. 2 *Inſt.* 551. 4 *Inſt.* 71, 72. *Vaugh.* 154. *Dy.* 377. *a. pl.* 30. *Cromp. Juriſdict. of Courts* 11. *Gilb. Hiſt. C. P.* 209, 212. *Bac. Abr.* 5. 4 *Bac. Abr.* 218.

A clerk of the court ought not to be arreſted for any thing which is not criminal, becauſe he is ſuppoſed to be always preſent in court, and muſt anſwer the plaintiff there; and therefore he that does arreſt him is puniſhable by the court, and therefore ſuch arreſt is accounted vexatious, which the law warrants not. *Lil. Abr.* 115. *Palm.* 403.

The right of being exempted and freed from arreſts by proceſs of other courts belongs to the Lord Chancellor or Keeper, and all the maſters. *Cromp. Juriſdict. of Courts* 48. *b. Bohun's Curſus Cancellariæ* 495. *Regiſters, Skin.* 521.

It belongs to curſitors, miniſters, officers, and known clerks of the court of *Chancery*, and to the menial ſervants of the Chancellor or Keeper, and his miniſters and officers. Order of *Chancery* of *Tueſday* 22d *Dec.* 5 *Car.* 1629. *Pract. Reg. in Chancery* 284,

*Practice of the High Court of Chancery* 31, 32. *Harriſon's Chancery Practiſer* 310. *Bohun's Curſus Cancellariæ chap.* 18. *p.* 490. See *Dy.* 287. *a. pl.* 48.

One of the clerks of the *Chancery* was ſued in the court of *Common Pleas* in an action of debt, and proceſs continued until the *writ of exigent*; and the defendant, who was the clerk, did ſue out a *ſuperſedeas quia improvide*, directed to the ſheriff; and afterwards he brought his *writ of privilege* directed to the juſtices there; *reciting* his privilege in the court of *Chancery*, and required the juſtices to ſurceaſe; and it was well debated, whether he ſhould have his privilege or not; and at laſt the privilege was diſallowed, and the *Chancery* clerk was forced to anſwer; for the court was lawfully ſeiſed of the plea by the act of the defendant himſelf, for inaſmuch as he did ſue out the *ſuperſedeas quia improvide*, he did affirm the juriſdiction of the court; for every *ſuperſedeas quia improvide* recites an appearance in court for the defendant, by his attorney, and ſhews his name whereby it appears to be merely his own fault. *Vide* a ſix clerk's privilege pleaded in the *Exchequer*, *Hard.* 316. *pl.* 8. *Cromp. Juriſdiction of Courts* 118. *b.*

If the defendant had not ſued out the *ſuperſedeas* to the *exigent*, notwithſtanding the *exigent* has gone forth, yet his privilege had been allowed; and thereupon divers precedents were produced to the court.

And it was then ſaid, that after the *writ of privilege* comes to the juſtices, they ought to make out to the ſheriff a ſpecial *ſuperſedeas* to the *outlawry*, reciting the *writ of privilege*. *Dy* 33 *b. pl.* 18. *Mo.* 753. 1038. See *Hardr.* 188, 189. *Andr.* 45. *Hard.* 117. *pl.* 2.

*Chancery* ſolicitors ſeem no more entitled to the privilege of being free from arreſts than "counſellors at law;" and as to what has been ſaid under that head is equally applicable to this, therefore I refer the reader thereto.

The privilege which the court indulges their officers with, is reſtrained to the ſuits only, which they bring in their own right; for if they ſue or be ſued as executors or adminiſtrators, they then repreſent common perſons, who have not that privilege; ſo that when an attorney is ſued as executor or adminiſtrator, he may be impleaded in another court; for he is ſued as in another's right, *viz.* in right of his teſtator, and his perſonal privilege is not applicable to him in any other relation, than as he is an attorney of the court *Lil. Abr.* 456. *Gilb. Hiſt. C. P.* 211. 4 *Bac. Abr.* 5. 2 *Rol. Abr.* 275. *pl.* 2, 3. *Hob.* 177. *Latch.* 199. *Brown.*

37, 47. 12 *Mod.* 316. *Raym.* 533. *Salk.* 2. *pl.* 4, 7. *pl.* 18 2 *Sid.* 157. *Dy.* 24. *pl.* 150. *Sav.* 20. *pl.* 49. See 39. *pl.* 88.

For the ſame reaſons, the wife of a privileged perſon, if ſhe be arreſted, ought not to claim the privilege of the court, nor to put in bail to the action as her huſband may, if he be arreſted; but her huſband muſt put in bail for her; and for want thereof ſhe is to be committed to priſon. 2 *Lil. Abr.* 257. *Noy Rep.* 68. 17 *Vin. Abr.* 517. *pl.* 2. *Vent.* 299. *Godb.* 10. *pl.* 13. *Dyer* 377. *pl.* 30. *Bac. Abr.* 111.

An attorney ſued as bail has no privilege. *Rep. and Caſ. Pract. C. P.* 64. *Keb. Rep.* 735. *pl.* 16.

If an officer of one court ſues an officer of another court, the defendant ſhall not plead his privilege; for the attendance of the plaintiff is as neceſſary in his court, as the defendant's in his; and therefore the cauſe is legally attached in the court where the plaintiff is an officer. *Gilb. Hiſt. C. P.* 211. 4 *Bac. Abr.* 5. *Godb.* 81. *pl.* 95. *Brownl.* 37. See *Hetl.* 28. *Lit. Rep.* 305. 2 *Stra.* 837, 1141. *Suppl. to Barnes* 34, 35, 36. *Barnard K. B.* 182.

If a privileged perſon brings a joint action with others, he loſes his privilege in this caſe, becauſe the others are not officers of the court, nor entitled to the attachment, which the court grants to their miniſters. *Gilb. Hiſt.* 212. *Bac. Abr.* 5, 191. 4 *Bac. Abr.* 223.

If an action be brought againſt him and others, he ſhall not have his privilege, for he would then deſtroy the plaintiff's action; for the plaintiff muſt ſue the others by original writ, and him by a petition to the juſtices; but this is to be underſtood, where the action is joint and cannot be ſevered without doing an injury to the plaintiff, the officer ſhall have his privilege. *Gilb. Hiſt.* 212. *Bac. Abr.* 5, 191. 4 *Bac. Abr.* 223. *Dy.* 377. *pl.* 30. *in Marg.* 2 *Rol. Abr.* 274. *pl.* 1, 3. 2 *Lev.* 129. *Ventr.* 288, 289. 3 *Salk.* 282. *pl.* 6. *Comb.* 12.

Denied for the ſame reaſon in *Chancery* to officers in the *Exchequer*. *Vern.* 246. *Ca.* 239. *Eq. Caſ. Abr.* 349. *pl.* 3.

This matter was fully conſidered in an action of *treſpaſs* brought in the *King's Bench* againſt an attorney and another perſon, the attorney pleaded his privilege, as an attorney of the *Common Pleas*, and concluded, *That he does not preſume the court will take cognizance, &c.* and on demurrer, though it was admitted that the nature of the action was ſeveral, yet the court, in conſideration of the above recited caſes, held, that the rule was general, and that the plaintiff was not

not bound to bring ſeparate actions; and thereupon they directed an *anſwer over*. 4 *Bac. Abr.* 222.

If an attorney af the *Common Pleas* be in *cuſtody of the marſhal*, for want of bail, at the ſuit of *A.* he may plead his privilege; for though he be taken on a bill of *Middleſex* or *latitat*, and in a common perſon's caſe, if he were brought in by ſuch proceſs, he is to anſwer to the plaintiff's demand againſt him by bill, and not to the proceſs that brought him; yet ſince it is a *maxim* in law, *That the law can injure no one*, ſuch fictitious treſpaſs to bring the party to appear, ſhall never ouſt the attorney of his real privilege. *Gilb. Hiſt.* 213, *Raym.* 93. 2 *Rol. Abr.* 275. *pl.* 6.

If the attorney be in *the cuſtody of the marſhal*, at the ſuit of *A.* and *B.* declare againſt him in *cuſtody of the marſhal*, he ſhall not plead his privilege againſt *B.* becauſe *B.* declares colatterally, as he is in priſon at the ſuit of *A.* and as to *B.* he is truely in *the cuſtody of the marſhal*; for being once ouſted of his privilege at the ſuit of *A.* he can no longer attend as an attorney in the other court, but is fixed in the *King's Bench*, and therefore cannot, by the ſuppoſition of the neceſſity of his attendance, ouſt the plaintiff of his action. 2 *Rol. Abr.* 275. *pl.* 7. *Ray.* 135. *Salk.* 1. *pl.* 3. 5 *Mod.* 310. See 2 *Bulſt.* 207.

An officer ſhall not have his privilege againſt the King; for as the executive power is lodged in the King, it would be unreaſonable that his court, which gives relief to private perſons, ſhould protect any ſubject from being brought to juſtice for offending againſt the laws, which concern the whole commonwealth. 4 *Bac. Abr.* 222. *Gilb. Hiſt. C. P.* 208.

In an action *qui tam* for continuing ſheriff longer than a year, the defendant pleaded privilege as an officer of the *Common Pleas*. The plaintiff demurred; and it was agreed, that as the King is party to this action; if the plaintiff entered a *retraxit*, yet the King may proceed: which was allowed by the court. Then where an action is ſued by the King the defendant ſhall not have privilege, for privilege is not good againſt privilege; and of that opinion the court ſeemed to be. *Ray.* 27. 3 *Salk.* 282. *pl.* 7. *Comb.* 319. *Fortſc. Rep.* 342. *Skin.* 542. *pl.* 10. 3 *Lev.* 398. *Lutw.* 193. *Lil. Abr.* 7.

One *F.* an attorney, having attended the *prothonotary*, on taxing coſts for not proceeding to trial in this cauſe, on his return home, was taken in execution on a *capias ad ſatisfaciendum*, iſſuing out of the court of *King's Bench*: on which he moved the court that he might be diſcharged. They ſaid they could not diſcharge him from the *King's Bench* proceſs; but on producing an *affidavit* of notice of

the

the motion, &c. the court made a rule for the officer and the plaintiff in that action to ſhew cauſe why they arreſted the ſaid *F.* and why the goods pledged with them for his enlargement, ſhould not be returned. On ſhewing cauſe, it appeared that *F.* had voluntarily given the goods to the plaintiff in that action. The court ordered the rule to be diſcharged. *Pract. Reg. C. P.* 40. *Barnes* 138. *Rep. and Caſ. of Pract. C. P.* 104.

The ſame rule was made on an attorney's being taken in execution, whilſt he was attending the execution of a *writ of inquiry*. *Pract. Reg. C. P.* 41. *Barnes* 137. *Rep. and Caſes of Pract. C. P.* 102.

One *G. H.* an attorney, being in *Serjeant's Inn*, waiting to attend Mr. juſtice *F.* on a ſummons, was prevailed by an agent for one of his creditors, under pretence of buſineſs, to go with him to a coffee-houſe in *Chancery Lane* near *Serjeant's Inn*; where, after the hour for the attendance at the judge's chambers was expired, he was arreſted. It appeared that *H.* had left his clerk in the judge's chambers, with directions to call him when the judge was there and at leiſure. On which the court ordered *H.* to be diſcharged. *Barnes* 278. *Rep. and Caſes of Pract. C. P.*

The ſaid *H.* was diſcharged, being taken in execution at the *Exchequer* coffee-houſe, while he was attending on a motion. *Rep. and Caſes of Pract. C. P.* 64.

An attorney attending his client's affairs at *Weſtminſter Hall*, being arreſted on an attachment for contempt, in not paying money according to a rule of court, was diſcharged. *Pract. Reg. C. P.* 50. *Rep. and Caſ. Pract. C. P.* 60.

A *ſuperſedeas* to a *latitat*, where the defendant was taken; and, becauſe he could not put in bail to the action, which was laid to 5000*l.* he ſuggeſted he was an attorney of the court, and claimed his privilege to be ſued by bill; and by the court he was diſcharged, and a *ſuperſedeas* awarded, without being brought up by *habeas corpus* out of the country. 2 *Keb.* 338. *pl.* 2. *Lil. Abr.* 194. *Lutw.* 1667. 8 *Keb.* 434. 78. *Mod.* 80. *pl.* 32. 2 *Keb.* 555. *pl.* 45.

A *Filacer* of the court of *King's Bench* was arreſted, and he moved to be diſcharged on common bail, becauſe of his privilege; but it appearing to the court, that he was very much indebted, they did not think proper to grant him his motion, but ordered him to put in bail to the ſheriff, and plead his privilege as he could. *Lil. Abr.* 189. 2 *Sid.* 164. *pl.* 3.

*Adjudged*

*Adjudged* that an attorney's clerk has no privilege. *Comb.* 12.

Nor the clerk, of the clerk of the crown office. 2 *Show. Rep.* 87. *pl.* 284.

Whether a prothonotary's clerk. *Stra.* 546. See *Ventr.* 298. *Raym.* 399. *Holt* 589. 2 *Raym.* 869. 7 *Mod.* 97. *Salk.* 4. *pl.* 9. 3 *Salk.* 283. *pl.* 8, 10, 11. *Stra.* 191, 192. *Barnard. K. B.* 141. 4 *Bac.* 225. *Barnes* 280. *Rep. and Caſ. of Pract. C. P.* 104, 105. *Forteſ. Rep.* 341, 342.

Nor a filacer's clerk. 2 *Lil. Abr.* 456.

The clerk of the clerk of the pells ſhall have privilege, *Comb.* 482.

So ſhall a clerk in the office of the *cuſtos brevium. Cro. Car.* 11. *pl.* 2. *Lil. Abr.* 116. 3 *Lev.* 343. *Sid.* 74. *pl.* 5.

So ſhall the curſitor's clerks in *Chancery. Skin.* 421.

*Note.* The courts not only privilege their own officers, but likewiſe the attendants of their officers, that they ſhall not be impleaded but in the court where their maſters are attending; but it muſt be ſuch ſervants as are neceſſary to them in their attendance, for they ſhall not have the privilege for any others *Gilb. Hiſt. C. P.* 213, 214.

The plaintiff may reply, that the defendant is not the ſervant of an officer of the court; but that he is a huſbandman in the country: traverſe, that he is a ſervant to the officer on his attendance to the court. *Gilb. Hiſt. ibid.*

*Per curiam.* If an officer commence a ſuit here, no privilege in any other court ſhall prevail againſt him; becauſe his attendance here is requiſite, and his privilege here is attached firſt by commencing his ſuit: and herewith all the preſidents agree. *Hard.* 305. *pl.* 2. *Ibid* 507. 3 *Salk.* 281. *pl.* 2. See 396. *Salk.* 194.

Where an officer or miniſter of the *Exchequer* is one of the parties in a *perſonal action*, he ſhall be ſued in that court; becauſe his abſence might hinder the King's affairs, 2 *Inſt.* 551.

In a joint action it is otherwiſe. *Vern.* 246. *Caſ.* 239. *Eq. Caſ. Abr.* 349. *pl.* 3. *March. Rep.* 149. *pl.* 219.

A ſervant to a miniſter or officer of the court has no privilege againſt a privileged perſon elſewhere. *Hard.* 365. *pl.* 2.

An

An auditor of the *Exchequer* and his ſervants, commiſſioners of the *Treaſury*, garter king at arms, the receiver general of the revenues, the clerk of the remembrancer, and an attorney of the *Exchequer*, are entitled to the privilege of this court. *Hard.* 164. *pl.* 3. 2 *Show. Rep.* 299. *pl.* 301. Order of the *Houſe of Commons*, of *Monday* 27th *Nov.* 1699. *Stat.* 2 & 3 *Ann. c.* 18. *ſect.* 1. *Rep. and Caſes of Pract. C. P.* 47.

Any Man that has a ſpecial privilege in another court, as an officer of the court, or as an attorney, ſhall have his privilege againſt the King's debtor; becauſe the privilege of a man as debtor, is but a *general* privilege. *Hard.* 365. *pl.* 2.

*Note.* This privilege was only for the benefit of the King, which is now diſuſed, and a *writ of Quo minus* is no more than a common action in this court. 3 *Salk.* 281.

*It has been held*, that the treaſurer of the navy is inſtantly on entering into office an accountant; and that an accountant's privilege will hold againſt a ſpecial privilege in another court, as an officer of the court or otherwiſe, though it be not alledged that ſuch an accountant is entered on his account; for that every accountant may be attached by the court to make up his accounts, and muſt attend for that purpoſe *from day to day*, and the King has intereſt in his attendance. 3 *Salk.* 281. *pl.* 2. *Hardr.* 365. *pl.* 2.

If an accountant has finiſhed his account, and reduces it to a debt, he ſhall have no privilege but as a general debtor. *Hardr.* 365. *pl.* 2.

The King, by writ of protection, might protect his debtor from being ſued or attached, until his debt was paid.

By *ſtat.* 25 *Ed.* 3. *c.* 19. the other creditors may have actions againſt the King's debtor, and proceed to judgment; but not to execution, unleſs they will pay the King's debt, *&c.* *Co. Lit.* 131. *b.* *Cro. Jac.* 477. *pl.* 10.

By *ſtat.* 12 & 13 *W.* 3. *c.* 3. No action, ſuit, proceſs, order, judgment, decree, proceeding in law or equity, againſt the King's original and immediate debtor, for the recovery of any debt originally and immediately due unto his majeſty, or againſt any accountant, or perſon liable to render any account to his majeſty, for any part of his revenues, or other original or immediate duty, or the execution of any ſuch proceſs, *&c.* ſhall be impeached or delayed by privilege of parliament; yet ſo that the perſon of ſuch debtor or accountant, being a peer of this realm, or lord of parliament, ſhall not be liable to be arreſted; or, being a member of the *Houſe of Commons*, ſhall not, during the continuance of privilege, be arreſted by any ſuch proceedings.

By the ſame *ſtat. ſect.* 2. Any action or ſuit may be commenced and proſecuted, in any of his majeſty's courts at *Weſtminſter*, againſt any officer or perſon employed in the revenue, or any other place of public truſt, for any miſdemeanor or breach of truſt relating to ſuch place of truſt, or any penalty impoſed by law to enforce the due execution thereof; and that no ſuch action, ſuit, or proceeding, although ſuch officer be a peer of the realm, or lord of parliament, or of the *Houſe of Commons*, or otherwiſe entitled to privilege of parliament, ſhall be ſtaid by privilege. *Stat.* 2 & 3 *Ann. ſect.* 1. Order of the *Houſe of Commons*, of *Monday* 27th *Nov.* 1699.

But nothing in this act ſhall ſubject the perſon of ſuch officer, being a peer of this realm, or lord of parliament, to be arreſted; but that all proceſs ſhall iſſue againſt ſuch officer or perſon, being a peer of this realm, or lord of parliament, as ſhall have iſſued againſt him out of the time of privilege: nor ſubject the perſon of ſuch officer, being of the *Houſe of Commons*, to be arreſted during the time of privilege: and againſt ſuch, being of the *Houſe of Commons*, ſhall be iſſued ſummons, and diſtreſs infinite, or original bill, ſummons, attachment, and diſtreſs infinite, which the reſpective courts are impowered to iſſue, until they appear.

*Holt*, chief juſtice, was not ſatisfied that the privilege of the clerks of the *Exchequer* was due to them of common right.

Corporations or bodies politic, or public companies, whether ſole or aggregate, cannot be arreſted, as the King, a biſhop, parſon, mayor and commonalty, dean and chapter. 10 *Co.* 29. *b.* *Co. Lit.* 250. 3 *Inſt.* 202. *Wood's Inſtitute of the Laws of England*, *b.* 4. *c.* 4. *p.* 596. *of edit.* 1763. *Salmon's Readings upon the Statute Law* 115. *Bohun's Inſtitutio Legalis*, *edit.* 1732. *p.* 108. *Mod.* 164. 3 *Salk.* 46.

A *capias ad reſpondendum* does not lie againſt defendants who are ſued in a corporate capacity, but ſuch proceſs is altogether null and void. 2 *Barnes* 328, 329.

A defendant coming to give ſecurity of the peace, (if it had been to have ſworn the peace, the arreſt would have been allowed) was afterwards arreſted in court, on an action of falſe impriſonment, and had his privilege. *Comb.* 29.

The defendant had a former cauſe in the *K. B.* wherein he was plaintiff, and one *B. U.* defendant; and in that he was ſerved with notice, that the preſent plaintiffs, who were two bailiffs, would juſtify as bail; and one of them ſent him a letter, that if he had any thing to ſay to them, they ſhould be at the coffee-houſe next *Weſtminſter-Hall* gate, the morning they ſhould juſtify. The defendant attended the motion accordingly; and as ſoon as they had juſtified, and the defendant went out with them to *Weſtminſter-Hall* gate, they procured him

to

to be charged with an action at their ſuit, for 100 *l.* On this matter, the defendant moved now, that the plaintiffs might anſwer the matters of the defendant's *affidavit*, for arreſting the defendant when he was attending the buſineſs of the court; and the court made a rule accordingly. *Barnard. Rep. in K. B.* 251.

On motion to diſcharge the above rule, it was allowed that the court had gone ſo far as to releaſe perſons from arreſts, which they have been taken on when attending the buſineſs of their own ſuits; but it was not known they had done this in any caſes but where the application was freſh before putting in of bail; *whereas*, in the preſent caſe, the defendant put in bail directly, and by that has ſubmitted to the juriſdiction of the court. The court ſaid, in the preſent caſe the plaintiff had a plain deſign in taking advantage of the defendant's attendance on his former ſuit, and premeditated ſcheme in getting him here by the letter of one of them writ to him. Accordingly they thought the *attachment* ought to go; but, on the plaintiff's agreeing to deliver up the bail-bond, and pay the coſts, the court only ordered the *attachment* to lie in the maſter's hands. *Ibid.* 262.

The defendant was arreſted, on his returning from an attendance in court upon the juſtifying his bail; Serjeant *W.* moved, that he might be diſcharged: and it was ordered accordingly. *Pract. Reg. C. P.* 341. *Barnes* 17. *Suppl. to Lil.* 22. *pl.* 3.

A *capias ad reſpondendum* indorſed for bail being iſſued againſt the defendant, he, before the return, and before he was arreſted, put in bail before a judge, and gave notice thereof to the plaintiff's attorney; but he not regarding the notice, cauſed the defendant to be arreſted, who being in cuſtody, moved for a *ſuperſedeas*; which, on a rule to ſhew cauſe, was granted; the court being of opinion, the plaintiff not having excepted to the bail within *twenty days* after notice, the bail ought to ſtand. *Pract. Reg. C. P.* 50, 51. *Barnes* 82. See *ibid.* 85.

*H.* after his attendance in court on his cauſe, went, about *three o'clock*, in a coach, from *Weſtminſter* to *Chancery Lane*, with his ſolicitor and others, to give inſtructions for a procedure in the cauſe; and there continued till *ten or eleven o'clock*, and then was arreſted by a a bailiff, on a *capias ad ſatisfaciendum*, on a judgment on a *ſcire facias*, on a judgment againſt him in the *Common Pleas:* and now it was moved, that he ſhould be diſcharged; for each party has privilege to attend his cauſe, *Mod.* 66. *pl.* 13. 2 *Lil. Abr.* 492. and, if he be arreſted in going or returning, it ſhall be conſidered a contempt of the court, on which the officer ſhall be puniſhed, and the party diſcharged; but it was not allowed: for here it does not appear, that there was any contrivance by the defendants, or any concerned in the cauſe, to procure this arreſt, in which caſe the court perhaps

will extend its power againſt the procurors; nor does it appear, that the officer knew he had attended his cauſe at *Weſtminſter*; for his warrant was dated before the arreſt, and there was another *ca. ſa.* taken out in *Trinity* term preceding, returnable in *London*, where the action was brought, and a *teſtat cap.* afterwards in *London* the firſt return of this term, before the *ca. ſa.* on which he was then taken; and the arreſt here was not on his attendance on that cauſe, but he had continued many hours in another place; and, if the court ſhould diſcharge him, how ſhall the ſheriff be defended againſt an action for the eſcape? *Brownl.* 15.

Where a man went to confeſs an indictment in the *King's Bench*, and was arreſted in his journey; the court would not diſcharge him, for he went of his own head; and there is a difference where a man attends on the court by proceſs, and when not. *Com. Rep.* 411.

When a perſon complains to the court of *K. B.* of a miſdemeanor, and it is adjudged his complaint is vexatious, the court will not allow the privilege of protecting him returning. 11 *Mod.* 79. *pl.* 13.

Where a man was going from court, where he had been to confeſs an indictment for an aſſault, and the plaintiff in an action for the ſame aſſault gets him arreſted, the court would not grant an attachment, becauſe there was no *affidavit* charging him to have had notice that he was going there for that purpoſe. 6 *Mod.* 90.

One that was coming into the court of *K. B.* to attend on his cauſe, was arreſted as he was coming, and was forced to put in bail; but, on a motion, and making it appear to the court, he and his bail were both diſcharged: and the party that arreſted him had been alſo puniſhed, had he not pretended that he knew not the party came about his buſineſs depending in the court; for the doing of this was deemed an affront to the court, as well as an injury to the party arreſted. 2 *Lil. Abr.* 455. *Goldſb.* 33, 34. *pl.* 8.

*Note.* In this caſe the defendant muſt appear in perſon, that the court may examine him, and that they may be ſatisfied on his oath, that he was either proſecuting or defending ſome ſuit pending in that court, when he was arreſted. *Gilb. Hiſt. C. P.* 207.

The defendant coming to execute a commiſſion, was arreſted, and he brought an *habeas corpus cum cauſa* to ſet him at liberty. *Pract. Reg. Chan.* 289. *Bohun's Curſ. Canc. c.* 18. *p.* 496.

A plaintiff was arreſted when he came up to examine witneſſes, and was diſcharged by a *writ of ſuperſedeas* of privilege. *Pract. Reg. Chan.* 289. *Curſ. Canc. c.* 18. *p.* 496.

If

If a proceſs has iſſued againſt an huſband, in coming to defend the ſame, the wife ſhall have privilege as well as the huſband; for they are conſidered as one perſon in law, and the wife cannot anſwer without her huſband. *Dy.* 377. *pl.* 30.

If the court gives either the plaintiff or defendant leave to inquire after evidence in any cauſe depending in court, and he is arreſted, he ſhall have privilege; but it is otherwiſe if he goes without the permiſſion of the court. For the court will then preſume it to be only an excuſe to get free from the arreſt. *Gilb. Hiſt.* 208.

The ſame, if one, on the day he has been attending his cauſe, be arreſted at *ten o'clock* at night, by one no way engaged in the cauſe, he ſhall not have privilege. *Gilb. Hiſt. C. P.* 207, 208. *Com. Rep.* 411. *p.* 170, 171.

If *A.* has a ſuit, againſt *B.* in *C. B.* and afterwards *B.* is arreſted in an inferior court, when he was not coming to or returning from the defence of his ſuit, he ſhall not have privilege. *Jenk. Cent.* 172. *Ca.* 40.

*Note.* The courts not only protect the perſons of their attendants, but likewiſe all thoſe things that are neceſſary for their journey, or the defence of their ſuits; but not merchandizes or goods for ſale or traffic. *Gilb. Hiſt. C. P.* 208.

One that is *ſubpœna'd* for a witneſs may have a writ of privilege, to protect him from arreſts in going or returning. For ſince they are obliged to appear by proceſs of the court, they will not ſuffer any one to be moleſted, whilſt he is paying obedience to their writ. *Gilb. Hiſt. C. P.* 209. *New Abr.* 565. 4 *New Abr.* 222.

The plaintiff being a butcher, brought an action againſt one *F.* for meat delivered into his family; which being carried down to *Wincheſter aſſize*, *F.* brought the new defendant *B.* an old woman who lived in the houſe, to ſwear, that the meat was ſent in on her credit, and that ſhe was the debtor. The trial ended on *Friday*, about *four* in the *afternoon*; and on *Saturday*, about *ſeven*, as ſhe was going home in a coach to *Portſmouth*, the plaintiff arreſted her by a *latitat*, for the ſame cauſe of action: and it was moved, on the ground of protecting a witneſs in going and returning from the court, that an attachment might iſſue againſt the plaintiff and bailiff; and it was proved, that the *latitat* was not delivered to the ſheriff till the day of the arreſt. On the other ſide it was inſiſted, though a witneſs ſhould have free liberty of going and returning, yet that did not extend to as long a time as ſhe thought proper to take; that *Portſmouth* was but *twenty miles* from *Wincheſter*, and the defendant might have been at home much ſooner; that ſhe was an old woman who lived in a garret,

garret, who was never to be met with, but was brought down merely to ſwear the plaintiff out of his debt.

The court ſaid, that the witneſs muſt have a reaſonable time to return in, and though *one day* was the leaſt that could be allowed; and that they could not try all the niceties of delays that might poſſibly happen; and whereas it was ſaid at the bar, that in *Middleſex*, if a witneſs returning from the ſittings, loiters by the way to drink a pot, his protection is determined; as to the latter reaſon, the court ſaid, that made againſt the plaintiff, by ſhewing a deſign. A rule was made for an attachment, but afterwards the parties agreed. *Gilb. Caſ.* 308. 2 *Stra.* 986. 4 *Bac. Abr.* 226. *Forteſc. Rep.* 164.

The court was moved to diſcharge one *C.* that was arreſted as he was attending the court, to give teſtimony as a witneſs in a cauſe, and for an attachment againſt the parties that did arreſt him. *Roll.* C. J. ordered a *writ of ſuperſedeas*, and that they ſhould ſhew cauſe why an attachment ſhould not be granted againſt them that arreſted him. *Sty.* 395.

If a witneſs, coming to teſtify in a cauſe in *Middleſex*, be arreſted in *London*, by one knowing the cauſe, he has no remedy but by *habeas corpus*, to examine and deliver him thereby; but if there be any contempt by the officer, *&c.* an attachment may afterwards be awarded againſt him; for they are as well to have privileges as the parties. *Law of Evid.* 29. *pl.* 47. *Keb. Rep.* 220. *pl.* 28.

In the caſe betwixt *Cromwell* the Protector, and one *S.* the privilege of the court was prayed, and granted, to protect a witneſs from being arreſted in coming or going from the court, who was to give evidence for the Protector, on an indictment of *high-treaſon* preferred againſt *S.* 2 *Lil.* 456. 492.

As jurors are ſummoned by the proceſs of the court, they are equally obliged to appear as witneſſes; and therefore are no more to be moleſted, while they are obeying the commands of the court, than witneſſes, parties to ſuits, or other attendants on the court. *Ib.*

No attorney ſhall preſume, at his peril, to make or cauſe to be made, any precept or writ with an *ac etiam*, *&c.* againſt any heir, executor or adminiſtrator, or in any caſe where, by the cuſtom of the court, ſpecial bail is not required. By rule of court of *Mich.* term 15 *Car.* 2. rule 2. *K. B.* and of *Mich.* term 1654. *C. P. ſect.* 12.

An heir, ſued as ſuch, ſhall no more be held to bail than an executor. 12 *Mod.* 511. 2 *Lev.* 204. *T. Jo.* 82. *Keb.* 803. *pl.* 3.

An executor or adminiſtrator ſhall not be held to ſpecial bail, becauſe the demand is not on the *perſon*, but the *thing*, viz. the *aſſets* of

the dead, unleſs there be a *devaſtavit* ſuggeſted; for in ſuch caſe he may be arreſted. *Lev.* 39. *Salk.* 98. *pl.* 4. 3 *Bulſt.* 317.

An executor is not to be held to bail on the ſurmiſe of a *devaſtavit*. *Ventr.* 321. But ſee *S. P.* ruled otherwiſe on motion. *Ventr.* 355.

If an *habeas corpus* be returned into any of the courts above, though the ſum be under 10 *l.* they will hold the defendant to bail, that ſo the plaintiff may not be in a worſe condition than he was below, where the defendant was held to bail; but in caſe of an executor or adminiſtrator, or heir, no bail is required, even on an *habeas corpus*. *Lev.* 268. *Sid.* 418. *pl.* 2. 2 *Keb.* 512. *pl.* 4. *Salk.* 98. *pl.* 4. *Hetl.* 72. *Lev.* 245.

They ought not to have been held to bail below, the debt not being their own. *Gilb. Hiſt. C. P.* 37. *Keb. Rep.* 89. *pl.* 67.

Executors or adminiſtrators ſhall not find ſpecial bail for the debt of the teſtator, though the debt be for a great ſum, as 30,000 *l.* or more; for it is not their debt, nor ſhall their bodies be liable to execution for it. 2 *Brownl. Rep.* 293. *Yelv.* 53.

An adminiſtrator who brings a writ of error, on *ſtat.* 3 *J. c.* 8. ſhall not give bail, though he is not exempted by the ſtatute. 4 *Mod.* 245. *Cro. Car.* 59. *pl.* 3. *Cro. Ja.* 350. *pl.* 2. *Lit. Rep.* 3.

If an adminiſtrator brings a writ of error on a judgment *of his own goods*, on a *devaſtavit* alledged; *by the whole court*—He ſhall find bail, becauſe, being charged here *with his own goods*, it is not like the caſe where an adminiſtrator is charged *with the goods of his teſtator*; but here it is as if he were charged *in his own right*. *Lev.* 345. *Sid.* 368. *pl.* 4. 2 *Keb.* 371. *pl.* 28. *Lev.* 39.

On a motion in the treaſury to diſcharge the defendant's wife, taken on *meſne proceſs* without the huſband. *Adjudged*, that ſhe ſhould be diſcharged on a common appearance; for otherwiſe it might be in the power of an huſband to ſet up feigned actions againſt his wife, and keep her in continual impriſonment; but in caſe both huſband and wife had been taken, then both ſhould be held till bail be given for both, for otherwiſe a woman might marry a priſoner, and thereby might defraud her creditors. *Rep. & Caſ. of Pract. C. P.* 117. *Barnes* 59.

If a married woman be arreſted, and the marriage is clearly made out, the court will order a commmon appearance; but in this caſe the defendant appeared to have acted as a ſingle woman for *twelve years*, which made the matter doubtful. *Barnes* 80.

If

If a married woman be arreſted, let the cauſe of action be what it will, ſhe ſhall be diſcharged on common bail. *Latch* 224.

If the huſband be arreſted, he ſhall not be diſcharged by giving bail for himſelf, without giving it for his wife likewiſe. 6 *Mod.* 17. *Keb.* 198. *pl.* 194.

A married woman ſealed a bond, and being arreſted and carried to priſon, on *affidavit* made that ſhe was covert, and entering her appearance, the court diſcharged her without bail. *Freem. Rep.* 210. *pl.* 216.

An action of *trover* and *converſion* was brought againſt huſband and wife, and the wife arreſted. *Twiſden* C. J.—The wife muſt be diſcharged on common bail. *Mod.* 8. *pl.* 25.

Action was brought againſt the huſband and wife, for a battery done by the wife; the huſband was a priſoner in the *King's Bench* before the action brought, and the plaintiff delivered a declaration to the turnkey of the priſon againſt the huſband and wife for this *battery*; and, on rules given to plead, judgment was entered by—*they ſay nothing*—againſt both, and the wife taken in execution. It was moved, that this was irregular; for, on delivery of the declaration, the huſband ſhould have filed common bail for him and his wife, who ſhould have appeared for them.

*Holt* C. J.—The plaintiff ought to have ſued out proceſs againſt the huſband and wife, and the ſheriff ſhould have returned *not to be found* for the huſband, and *taken the body* for the wife; and then, on common bail filed for her, there might be judgment againſt both. It was objected, if there be proceſs againſt huſband and wife, and the ſheriff return *not found* for the huſband, and *taken* as to the wife, ſhe ſhall be diſcharged. To which *Holt* anſwered, No; ſhe ſhall not be diſcharged but on common bail, and then new proceſs ſhall go againſt the huſband, with a *ſame day* given to the wife. And becauſe no bail was entered for the wife, the judgment was ſet aſide. *Afterwards*, in another caſe, *Holt* C. J. held, if an action be brought againſt the huſband and wife, and the huſband is arreſted, he ſhall give a bail-bond for the appearance of him and his wife, and muſt put in bail for both; but if one bring an action againſt the huſband only he cannot declare againſt the huſband and wife. *Salk.* 114. *pl.* 3. *Comb.* 334.

If a *latitat* goes forth againſt the huſband and wife, and the huſband only is taken, the huſband ſhall find ſurety for himſelf and his wife, or otherwiſe he ſhall lie in priſon until he find bail, as well for his wife as for himſelf; and it was ſaid, that this has been the uſage of the *King's Bench* for the ſpace of *forty years*. *Goldſb.* 127. *pl.* 19.

A huſband

A husband and wife were arrested for a debt due from the wife while single; bail above put in for both, and both rendered to the *Fleet* in discharge of bail. On motion to discharge the wife, detained by *mesne process*, not in execution; adjudged, that if the wife had been arrested before the husband, she must have been discharged on common appearance; after the husband is arrested, she cannot be taken into custody again. Rule to discharge the wife by writ of *supersedeas*, on entering a common appearance. 2 *Barnes* 74.

In an action of *trover* against husband and wife, and judgment and execution against both, the court refused to discharge the wife out of custody, unless it could be shewn that there was fraud and collusion between the plaintiff and the husband, to keep her there. 2 *Stra.* 1167.

A husband and wife were arrested for the debt of the wife only when sole, and the court discharged her, and said the husband must lie till he puts in bail for both. 2 *Stra.* 1272.

A *latitat* was sued out against *J. S.* and *A. S.* husband and wife, by *T. D.* The wife was arrested, but the husband could not be taken; the sheriff returned *I have taken the body*, for the wife, but *not to be found*, for the husband; the wife herself did not appear for the husband. The question was, What should be done in this case? And it was held by the court, that nothing could be done unless bail was put in by the husband; for the wife without the husband cannot be sued, nor can put in bail; and against the husband, unless he be first taken, and put in bail, there cannot be any declaration. And therefore, in this case, in regard the plaintiff cannot declare, the wife was dismissed. And it was said, that he ought to sue them by process of *outlawry*, and by that means he might have a remedy; for it were a great mischief that a married woman should intermeddle, and merchandise, and procure goods into her hands, and the husband absenting himself, or keeping in his house, there shall be no remedy against them: and although it was alledged, that the course has been in an information of *recusancy* against husband and wife, that the husband appearing has been compelled to find bail for himself and his wife, it was answered that it was at the discretion of the court; and the reason thereof may be also, because the husband is to put in bail when she appears, and the loss only lies upon him. But this reason will not hold where the wife only is arrested. *Salk.* 115. *Cro. Jac.* 445. *Cro. Char.* 58. *pl.* 2. *Lit. Rep.* 18. *Sid.* 20. *pl.* 2. 12 *Mod. Rep.* 444, 445. *Leon.* 138.

A plaintiff made *affidavit* for bail, that the defendants, or one of them, were indebted for board, cloaths, jewels, *&c.* provided for the wife; the defendant, the husband, an infant, moved for a common appearance. The court held that if an infant marries a woman

of full age, he is liable to her debts; but thought the plaintiff's affidavit not sufficiently certain. On which the plaintiff had leave to make a new *affidavit*, and explain what was due before the defendant the wife was of age, and what after; and whether the debt or any part, became due before the marriage, or after, and the plaintiff made a new *affidavit* accordingly, and the sum for which bail was to be given was moderated at a judge's chamber. 2 *Barnes* 72. *Pract. Reg.* 72. *C. P.* 224.

*Note.* An infant may be arrested for necessaries.

By *stat.* 5 *Geo.* 2. *chap.* 30. *sect.* 5. Every bankrupt shall be free from arrests in coming to surrender to the commissioners, and from the actual surrender for *forty-two days*, or such further time as shall be allowed to finish his examination, provided such bankrupt was not in custody at the time of surrender.

By *sect.* 13. If any bankrupt, who shall have obtained his certificate, shall be taken in execution, or detained in prison, on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any one of the judges of the court wherein judgment has been obtained, on such bankrupt's producing his certificate allowed, to order any sheriff or gaoler who shall have such bankrupt in his custody, to discharge such bankrupt without fee.

By *sect.* 47. All actions and proceedings thereon, for causes and matters arising before the time of the bankruptcy, of any such bankrupt as above said, are discharged against him, and his bail so obtaining such certificate so allowed as aforesaid.

By *sect.* 7. In case any bankrupt shall be arrested, prosecuted or impleaded, for any debt due before such time as he became bankrupt, he shall be discharged upon common bail.

This *stat.* extends not to debts due to a bankrupt, as executor, but it is for this particular reason, because they are appropriated to the testator's debts; and if they were assigned, it would be wrong, *viz.* a *devastavit*: and it being objected, that it extends not to debts due to the bankrupt jointly with an other, it was answered by Lord Ch. J. *Parker*, in delivering the opinion of the court, that the case cited for that purpose from *Lev* 17. is not determined. *Will. rep.* 254. 10 *Mod.* 161, 245. *Gilb. Cas.* 323.

A defendant having produced his certificate as a bankrupt, allowed and confirmed, moved for a common appearance in this action, which was an action of *debt* on bond for payment of money by instalments, some of which were not payable till after the bankruptcy; and the question

queſtion was, whether this be a debt diſcharged by the certificate, or not? After the *firſt* default of payment, the bond is forfeited, and the penalty is the debt in law. The court will not enter nicely into the matter on bail or no bail. Rule for common appearance. 2 *Barnes* 82.

An action was brought in 1748, by *C.* the original plaintiff againſt *S.* the original defendant; ſoon after which *S.* became a bankrupt, and obtained his certificate allowed and confirmed: notwithſtanding which the bail-bond was put in ſuit, in the ſheriff's name, againſt *S.* the preſent defendant, one of the bail; and, on his application, a rule was made to ſhew cauſe, and afterwards abſolute to ſtay the proceedings. 2 *Barnes* 81.

A man rents a houſe for years, by leaſe, at *C.* and becomes a bankrupt, and ſurrenders all his goods and effects to the commiſſioners, according to *ſtat.* 5 *Ann. c.* 22. and, with the reſt, this leaſe; and his certificate was allowed; but being taken into cuſtody for non-payment of the rent ſince, he moved by counſel to be diſcharged: but the court would not grant it, and forced him to put in bail; for they ſaid, the act of parliament did not make void the contract between him and his landlord. 7 *Vin. Abr.* 129. *pl.* 2.

A note was given on a day, promiſing payment a year after; the perſon who gave the note became a bankrupt after the note was given, and before the day of payment; and the queſtion was, whether the bankrupt being diſcharged by *ſtat.* 5 *Ann, c.* 22. and 5 *Geo. c.* 30. this note was diſcharged? And by three barons, againſt *Price*, it is not. *Bunb.* 120.

A defendant and his partner in trade had a joint commiſſion of bankruptcy taken out againſt them, under which they obtained a certificate. The plaintiff was a ſeparate creditor, and had obtained a judgment before the act or commiſſion of bankruptcy; and having now the body of the defendant in execution, the court was moved to diſcharge him, upon the authority of *Howard* v. *Poole*, 2 *Stra.* 995. 2 *vol. Gen. Syſt. Bankrupts* 251. *Law for and againſt Bankrupts*, *p.* 289. *Dav. Law of Bankrupts* 431. Where it was held, that a ſeparate creditor might come in under a joint commiſſion; and alſo on *Eq. Caſ. Abr.* 55. 2 *Vern.* 707. 2 *Will. Rep.* 500. and the court diſcharged him accordingly. 2 *Str.* 1157. 3 *Will. Rep.* 24. *Barnard. Rep. K. B.* 469. *Fitz. Gib.* 251.

If there be two partners, and one of them becomes bankrupt, and, on a ſeparate commiſſion being taken out againſt him, his certificate is allowed, this does not only diſcharge the bankrupt of what he owed ſeparately, but what he owed jointly, and on the partnerſhip account, becauſe by the *ſtat.* the bankrupt on making a full diſ-

covery, and obtaining his certificate, is to be discharged of all debts. Now as the debts he owes jointly with another are equally his debts as what he owes on a separate account, consequently he is to be discharged of both his joint and separate debts. And so it has been determined by the judges of *K. B.* by the Lord Chancellor *Parker*, 3 *Will Rep.* 24.

A bankrupt taken on an attatchment for not performing an award; after which he became a bankrupt, and obtained his certificate, and now moved to be discharged; but was opposed, because (it was said) bankruptcy does not purge a contempt.

*Per curiam.*—This was a demand for which an action of debt would lie; and the *stat.* says, he shall not be arrested, prosecuted or impleaded, for any debt due from the bankruptcy. It would therefore be hard to keep him in custody when the duty is discharged. 2 *Stra.* 1152.

By the discharge of a bankrupt husband, his wife will be for ever discharged. 10 *Mod.* 246, 247. *Will. Rep.* 257. *Gilb. Cas.* 327.

A defendant, a bankrupt, was rendered in discharge of his bail after judgment, and now moved to be discharged pursuant to the bankrupt act. The plaintiff objected, that the words of the act extend only to persons charged in execution, or by virtue of judgments; the judgment appeared to be for a debt due before the bankruptcy, and was entered in *Hilary* term last; the render was in the beginning of *April*, and the bankrupt's certificate was confirmed the 18th of *April*. It was argued for the defendant, that the words of the act extended to bankrupts detained in custody for debts due before they became bankrupts, which debts are discharged by the act; let them be detained how they will, in execution or otherwise, they are to be discharged. The court, after taking time to consider the matter, ordered the defendant to be discharged. *Barnes* 261.

A defendant, in *January* 1728, drew bills on *Spain*, which in *March* were returned protested for *non-acceptance*; between the drawing and return he became a bankrupt; and being sued to execution as the drawer, he moved, on *stat.* 5 *Geo.* 2. *c.* 30. to be discharged, it being a debt contracted before his bankruptcy.

On the other side it was insisted, that this cause of action arose upon the *non-acceptance* and protest, which are both necessary to be averred in order to maintain the action, and the charges thereof are to be recovered.

*Per curiam*—The principal is the drawing the bills, and therefore he must be discharged. 2 *Stra.* 949. 2 *Barnard. rep. K. B.* 251, 255.

The defendant gave a bond of indemnity, and before any breach became a bankrupt; and being now ſued, moved to be diſcharged on common bail; butthe court compared it to the caſe of *Tully* v. *Sparks*, and ordered he ſhould give ſpecial bail. 2 *Stra.* 1160.

A defendant, the 19th *May* 1734, was bail on a writ of error. On the 25th of *October* 1734, he committed an act of bankruptcy, and after a commiſſion obtained his certificate. On the 12th of *Nov.* 1735, the judgment was affirmed, and in debate on the recognizance, he pleaded his diſcharge, and that the cauſe of action aroſe before his bankruptcy: and the Ch. J. on the trial held, that the defendant was not diſcharged according to the caſe of *Tully* v. *Sparks*; for this was but a contingency, for which the plaintiff could not come in under the commiſſion, *ſtat.* 7 *Geo. c.* 31. only letting in thoſe where the payment was certain, though future. Therefore there was a verdict for the plaintiff. 2 *Stra.* 1043.

On a motion to diſcharge the defendant on execution, as being a bankrupt on *ſtat.* 5 *Geo.* 2. *c.* 30. It appeared to the court, that the debt was contracted before ehe bankruptcy, and ſued for and recovered pending the commiſſion, and before any certificate was obtained; and the judgment was afterwards affirmed on a *writ of error*, and coſts given on ſuch affirmance; and the court diſcharged him as to all; for not having his certificate, he could not plead to the action, and coſts were attendant on the original judgment, and cannot be conſidered as for delay of execution, when it appears there ought to have been no execution as though no *writ of error* had been brought. 2 *Stra.* 1196.

A rule was made abſolute (on *affidavits* of ſervice, no cauſe being ſhewn to the contrary) for leave to enter a diſcharge on the recognizance of bail, the defendant, pending the action, having become a bankrupt, had obtained his certificate allowed and confirmed. 2 *Barnes* 87.

A rule was made abſolute to diſcharge the defendant, a bankrupt, taken in execution for a debt which accrued before the bankruptcy: the defendant could not plead his diſcharge in the firſt inſtance, becauſe he did not obtain his certificate until after he was obliged to plead. But it was inſiſted by the plaintiff's counſel, that he might have pleaded *after the laſt continuance*. Adjudged that theſe caſes muſt be conſidered equitably. *Ibid.* 264.

A bankrupt ſo found, was ſued for a debt on bond, before his certificate was allowed, but he had ſurrendered his effects, and ſubmitted to be examined, and his certificate not being allowed, he pleaded *not his deed*, and judgment was given againſt him. He had afterwards a certificate allowed and confirmed. The obligee, *three or four*

*four years* afterwards, brought a writ of *ſcire facias* on the judgment; and the defendant pleaded *ſtat.* 5 *Ann. chap.* 22. and that the cauſe of action accrued before his bankruptcy: and on iſſue joined it was found againſt the bankrupt, he (as was alledged) not being able to get the commiſſion, or a copy thereof, to produce at the trial, and the plaintiff afterwards had judgment. The plaintiff got an injunction; but the maſter of the rolls, on the hearing diſmiſſed it, as a matter wholly at law, but on appeal, L. C. *Macclesfield* reverſed the decree, but ſeemed to admit, that, as the caſe was only matter of miſpleading, equity ſhould not relieve; but on the ſeveral circumſtances of the caſe, a perpetual *injunction* was granted. 2 *Will. Rep.* 70.

One brought an action for rent againſt *B.* a bankrupt, and obtained judgment before his certificate was allowed by the Lord Chancellor; and the certificate not being allowed till after the rules of pleading were out, the bankrupt had no opportunity of pleading his certificate and taking the benefit of *ſtat.* 5 *Ann.* But in the *writ of ſcire facias* againſt the bail, the certificate was pleaded, and the plea over-ruled; ſo that the bankrupt had no relief but in equity, or by *writ of audita querela*, which is an equitable remedy at law. A motion was made for an *injunction*; but *Cowper* C. denied the motion, (though the council for the motion ſaid, there were ſeveral precedents of *injunctions* of this ſort, but had none ready to produce) becauſe this was a merciful law made in favour of the bankrupt, and to the prejudice of the creditors, and therefore not to be extended in equity farther than the law. 7 *Vin. Abr.* 131. *pl.* 5.

The plaintiff gave his note for 36*l.* He was afterwards diſcharged on the inſolvent debtor's act; afterwards meeting the plaintiff, he promiſed to pay the debt at *two guineas* a month, and paid *twelve guineas* accordingly. And being now ſued for the reſt, the court diſcharged him on common bail, ſaying it was no new conſideration, but the old debt. 2 *Stra.* 1218, 1233.

A defendant having borrowed 500*l.* of the plaintiff, gave her a mortgage for ſecurity, which mortgage was accidentally burnt. The defendant had paid 100*l.* in part; and, in *April* 1738, was prevailed on to give the plaintiff a new bond for the remaining principal and intereſt; whereon an indorſement was made, ſigned by the plaintiff, acknowledging the new bond to be for the old debt. The defendant, after having obtained his diſcharge from the ſeſſions, as a fugitive for debt, was arreſted on this new bond, and applied for a common appearance, and had a rule to ſhew cauſe, which was made abſolute. The juriſdiction at the ſeſſions is final, no appeal lies from it. *Per curiam*—This debt appears to have been contracted, incurred, and occaſioned before the day appointed for that purpoſe mentioned in the ſtatute, which ſtatute extends to 500*l.* debts, beſides the intereſt and coſts *Barnes* 82. 6 *Mod.* 301. 2 *Raym.* 1089.

*N. B.*

*N. B.* The laſt inſolvent debtors act, *viz. ſtat.* 1 *Geo.* 3. *c.* 17. extends to 1000*l.*

*Holt* Ch. J. delivered the opinion of the court, and alſo of the judges of the *Common Pleas*, whom he ſaid he had conſulted on the following caſe, which was as follows. *J. S.* is in goal for 20*l.* and no more, and is diſcharged by the new act of parliament, *viz.* 2 & 3 *Ann. c.* 16. Then, after ſuch diſcharge, he is arreſted for a debt of 100*l.* due before the diſcharge; and the queſtion was, if he ſhould be diſcharged again without ſpecial bail? He ſaid it ſeemed doubtful, becauſe of the words in the ſtatute, *viz. for any debt whatſoever.* But then the *proviſoe* is to be conſidered, which is, *provided that no man ſhall be diſcharged by virtue of this act*, if he ſtand charged, and be indebted above 100*l.* now it is objected, that this ſhall be applied to the firſt diſcharge only: but he ſaid, it ought to be applied to the ſecond diſcharge as well as the firſt; for he that is a ſecond time diſcharged, is as much diſcharged by virtue of this act, as he that is diſcharged the firſt time. Beſides it was the intent of the act, that no man ſhould be diſcharged that owed above 100*l.* nor can the diſcharge of the other debts be a diſcharge in this, wherewith he was never charged. 11 *Mod.* 36. *pl.* 7. 6 *Mod.* 310. 2 *Raym.* 1088.

A perſon who had been diſcharged on the act of poor priſoners, gave bail to an action of debt on bond with which he was charged in priſon, and confeſſed the action; and that execution might go againſt his goods, *&c.* the plaintiff takes out an execution on the goods, and likewiſe ſues the bail, who ſurrender their principal in diſcharge; and this appearing on motion, the court ſaid, that bail was actually diſcharged by the pleading and judgment, and ordered him to bring a record of the judgment into court, whereon he was taken in execution, and that they thereon would diſcharge him. 6 *Mod.* 22.

The producing a duplicate of the defendant's diſcharge as fugitive, was held ſufficient; and *affidavits* on the plaintiff's part to ſhew that the defendant was not abroad beyond the ſeas 1ſt *January* 1747, refuſed to be read. The court ſaid, it ſhould have been objected at the ſeſſions: it may be pleaded, but cannot be entered into on the queſtion of bail, or no bail; Therefore there was a rule made in the treaſury for a common appearance. 2 *Barnes* 81.

A defendant produced a duplicate of his diſcharge as an inſolvent debtor, and after having put in bail before a judge, moved in the treaſury to be diſcharged on entering a common appearance; which, on hearing the attornies on both ſides, was granted, and the bail-piece ordered to be vacated; the defendant being conſidered as in the cuſtody of his bail, and his perſon being by the ſtatute to be diſcharged. 2 *Barnes* 85.

On a motion made by the defendant for a common appearance, on producing a duplicate of his diſcharge at the ſeſſions of the peace, under *ſtat.* 21 *Geo.* 2. *c.* 31. as a fugitive for debt. The plaintiff objected that the defendant was an *Iriſhman*, and, inſtead of flying from his native country, fled to *Ireland*, as mentioned in the duplicate; and that *Ireland* is not within the words of the ſtatute, (*foreign parts.*) The court did not think it neceſſary to give an opinion, whether the defendant was within the ſtatute or not; or whether, on the face of the duplicate, the ſeſſions had exceeded their juriſdiction. The quarter-ſeſſions are to determine as to immediate liberty; afterwards the court, or a judge, are to diſcharge a defendant, on producing his duplicate. The plaintiff may put the point on trial, but the defendant muſt not remain in cuſtody till the determination. Therefore the rule was made abſolute for a common appearance. 2 *Barnes* 88.

On an action of *debt* on a bond of 200*l.* The defendant, without craving *oyer* of the bond or condition, pleads that he was diſcharged by the act of poor priſoners, *viz. ſtat.* 2 & 3 *Ann. c.* 16. The Chief Juſtice took exception, that the condition of the bond not appearing, the whole 200*l.* muſt be taken to be a debt, and conſequently the defendant is not within the act of parliament, (though in truth the bond was only for the payment of 100*l.*) And for this reaſon judgment was given for the plaintiff by the whole court. For they could not take notice, but that the whole 200*l.* was a juſt debt to the plaintiff.

The Chief Juſtice ſaid, that there were *three* ſorts of diſcharges by this act. *Firſt*, the original diſcharge by the juſtices of the peace at the ſeſſions out of actual cuſtody. *Secondly*, if a perſon ſo diſcharged was arreſted again, there was a ſecond diſcharge on common bail. And a *third*, whereby the body of the debtor was exempted from being liable to be taken in execution. But that the *proviſoe* extended to all theſe, that no perſon ſhould have any benefit of any of them, that was indebted above the ſum of 100*l.* principal money and damages.

*Powel* J. ſaid, that if the money in the condition was not paid at the day, the intereſt was damages. 2 Ld *Raym.* 1196.

By *ſtat.* 2 *Geo.* 3. *c.* 11. *ſect.* 65. No volunteer ſoldier in *Great Britain* or *Ireland*, or *Jerſey*, *Guernſey*, *Alderney*, or *Sark*, or the iſlands thereto belonging, or in any of the plantations during the continuance of this act, (which is the mutiny act, and one of them is paſſed annually, and has been ever ſince the year 1713) ſhall be liable to be taken by any proceſs or execution whatſoever, (other than for ſome criminal matter;) unleſs ſuch proceſs, *&c.* be for a real debt, or other juſt cauſe of action; and unleſs, before taking out ſuch proceſs, (not being for a criminal matter,) the plaintiff, or ſome other perſon

perſon (ſo in the act) in his behalf make an *affidavit*; that to his knowledge, the ſum juſtly due, or the debt, or damages and coſts, for which the execution is iſſued, amounts to 10 *l.* over and above all coſts of ſuit in the ſame action, or in any other action on which the ſame ſhall be grounded; a memorandum of which oath is to be marked on the back of the writ."

Judgment on a writ of inquiry in the *Palace Court*, for 11*l.* 11*s.* 4*d.* *viz.* 3*l.* 17*s.* 4*d.* damages, and 7*l.* 14*s.* coſts; the defendant moved the judge of that court, that no execution might iſſue againſt his perſon, he being a ſoldier in his majeſty's ſervice; which was ordered accordingly, with directions to the defendant to apply for coſts in caſe his perſon ſhould be taken in execution; the plaintiff brought an action of debt upon that judgment in this court, and held the defendant to bail, who moved that the bail-bond might be delivered upon entering an appearance, and obtained a rule to ſhew cauſe, and for coſts.

On ſhewing cauſe, the court were of opinion, that though the former acts of parliament have been proved defective in preventing ſoldiers being taken out of his Majeſty's ſervice, yet the laſt ſtatute, *viz.* 14 *Geo.* 2. *c.* 9. *ſect.* 53. is ſufficient, the original debt being under 10*l.* and the plaintiff having proceeded to hold the defendant to bail, after he knew the opinion of the judges of the *Palace Court*, the rule was made abſolute. *Barnes* 312.

This exemption from being arreſted, (except for criminal matters, or a debt of 10*l.*) extended formerly only to volunteers. But by *ſtat.* 30 *Geo.* 2. *c.* 8. *ſect.* 20. *It is enacted*, "That the commiſſioners preſent at a meeting for enliſting ſoldiers, as in this act is before directed, ſhall cauſe the 2d and 6th ſections of the articles of war, againſt mutiny and deſertion, to be read to the men impreſſed by virtue of this act, and from and after reading the ſaid articles of war, every man ſo impreſſed ſhall be deemed a liſted ſoldier to all intents and purpoſes, and ſhall not be liable to be taken out of his Majeſty's ſervice by any proceſs, (other than for ſome criminal matter). As the words of the act go no further, ſuch ſoldier may be arreſted on an execution.

A *writ of latitat* iſſued out of the *King's Bench* to the ſheriff, to arreſt a man; the ſheriff returned that the man was liſted according to *ſtat.* 4 *Ann. c.* 10. *therefore I cannot take him.*

The above act was for the better recruiting her majeſty's army and marines, which has been long ſince expired.

On a motion againſt the ſheriff, for (as pretended) he ought to have arreſted the man; becauſe by the act the plaintiff had liberty to go on to judgment and execution againſt any thing but the defendant's

body, and then the court will discharge him on common bail, if he appeared to them to be listed regularly; but the sheriff should not take upon him to determine whether he was regularly listed. The court on consideration, held it to be a good return; and that this act worked as a *superſedeas* to any proceſs to be iſſued againſt perſons liſted; and that if the ſheriff ſhould arreſt ſuch a perſon, he would be liable to an action of falſe impriſonment; and they ſaid it appeared, that the act did not intend that the man ſhould be arreſted, and then diſcharged on common bail; by the *proviſoe*, "that the plaintiff, on leaving notice in writing at the defendant's laſt place of abode, or giving to the defendant ſuch notice in writing of the plaintiff's cauſe of action, might file common bail for the defendant, and proceed to judgment &c. that in caſe the man was not regularly or fairly liſted, this was a falſe return, and the plaintiff had his remedy againſt the ſheriff by action for the falſe return." 2 *Lord Raym.* 1246.

A judgment was obtained againſt the defendant, and after judgment, he voluntarily liſted himſelf for a ſoldier; and after the ſaid liſting, he was taken in execution by virtue of a *capias ad ſatisfaciendum* on that judgment. He moved that he might be diſcharged according to the late act of parliament, *viz. ſtat.* 4 *Anne*, *c.* 10.) which ſays, *That any perſon that voluntarily liſts himſelf a ſoldier, ſhall not be taken out of her Majeſty's ſervice by any proceſs whatſoever.* The court denied the motion; for the words *any proceſs*, muſt be intended only as a *meſne proceſs*, and not to be extended to executions; for that would be hard on creditors, and put them without remedy. Wherefore the defendant was not diſcharged. 11 *Mod.* 252. *pl.* 2. 234. *pl.* 4.

*Holt*, C. J. ſaid, he was never of opinion that executions were within the above act, though the judges of the *C. P.* were of that opinion. 11 *Mod.* 234. *pl.* 4.

To remove all doubt as to this, the words now conſtantly inſerted in the mutiny act are, "That no perſon liſted as a volunteer in his Majeſty's ſervice as a ſoldier, ſhall be liable to be taken out of his Majeſty's ſervice by any proceſs or *execution* whatſoever, (other than for ſome criminal matter) unleſs for a real debt, &c." 2 *Geo.* 3. *c.* 11. *ſect.* 65.

*Note*, The firſt mutiny act, in which the words *or execution* were added, is 4 *Geo. c.* 4.

A ſoldier being in cuſtody on a writ *de excommunicato capiendo* for non-payment of coſts in a ſuit for tithes in a *Court Chriſtian*, he was ordered by the *King's Bench* to be diſcharged, as being within the reaſon of the mutiny act. 11 *Mod.* 191. *pl.* 6.

On a motion to diſcharge one on common bail on the liſting act. The caſe was, One was liſted into the Queen's ſervice, ſerved ſome time,

time, and afterwards was discharged, on his finding another able bodied man, who is now in the army. The question was, Whether the clause in the act, *or find another able bodied man*, shall refer to the time of his listing before a justice of the peace, or whether any time afterwards will do, provided the man whom he finds continues in the service?

The court were of opinion, that the latter was sufficient: and thereupon the man was discharged. 11 *Mod.* 235. *pl.* 6.

A man puts in special bail to an action, and the plaintiff had judgment against the defendant by default. The bail surrendered the defendant: it was moved to discharge the defendant, because he had listed himself a soldier after the bail was put in, and before judgment, but was refused by the court. 2 *Vern.* 697.

It was moved to have one discharged on *stat.* 10 & 11 *Will.* 3. *c.* 11. *last sect.* for disbanding the army, whereby soldiers are exempted from suits for *three years* on *affidavits*. *Holt Chief Justice*—All we can do is to order common bail; he must discharge himself of the action by pleading the act, *&c.* and the plaintiff may traverse his allegations; and so was the rule. 12 *Mod.* 336.

On a motion to discharge the defendant out of execution, he being an out-pensioner of *Chelsea College*, it was refused; he not being a soldier in actual service. The case of *Bowler* v. *Owen* was cited by the court. *Barnes* 311. *Rep. & Cas. of Pract. C. P.* 77. *Pract. Reg. C. P.* 60.

A trooper, who listed on the 16th of *May*, was arrested on the 19th. On a motion to discharge him on common bail, it was urged for the plaintiff, that as the *affidavit* only went for his learning to ride, this is not doing duty as the act requires, but only to qualify himself for doing duty. *Per curiam*—It is doing duty, for he receives his pay, and must be discharged on common bail. *Stra.* 2. 14 *Mod.* 347.

On a motion to discharge a gunner in the train of artillery, on common bail, it was insisted for the plaintiff, That the gunner receives *one shilling* a day for his pay, that he is appointed by warrant, and that he was in the nature of a commission officer. To this it was answered, That a gunner is listed as common soldiers are, and that he is liable to all the penalties in the mutiny act, to which common soldiers are liable. *Per curiam*—We are informed that a gunner is within the description of a common soldier; the extraordinary pay is only in consideration of the skill requisite in his place. Therefore the party was discharged on common bail. *Stra.* 7. 10 *Mod.* 346.

A defendant, a life-guard-man, having been arreſted by a *facias ad ſatisfaciendum*, in order to obtain his liberty paid a ſum of money.

On ſhewing cauſe againſt a rule why the ſaid money ſhould not be repaid, it was inſiſted for the plaintiff, that a life-guard-man is not to be conſidered as an inliſted ſoldier; for that, ſo far from receiving any inliſting money, he uſually gives *ſixty guineas* or more for his place. The propriety of the preſent application was alſo objected to, becauſe it was not for the obtaining of liberty, but to have money repaid, which this court in no inſtance had cauſed to be done.

*Wright*, juſtice—The giving money is not neceſſary to an inliſting; as he was forced to pay money for his liberty, the preſent application to this court is very proper. Therefore the matter was ordered to ſtand over, till an inquiry could be made in what manner this man was inliſted; afterwards, in the ſame term, a certificate being produced, that he was inliſted as a private ſoldier, and that the articles of war were read to him, the rule was made abſolute. 4 *Bac. Abr.* 498.

By *ſtat.* 2 *Geo.* 3. *c.* 20. *ſect.* 16. Officers of the *militia*, and private *militia men*, ſhall, from the time of their being drawn out into actual ſervice and embodied, be ſubjected and made liable to all the proviſions contained in the yearly acts againſt mutiny and deſertion, relating to officers and ſoldiers muſtered, liſted, or in pay, in his Majeſty's ſervice, excepting only as to ſuch particulars as are or ſhall be otherwiſe provided for, by any act of parliament for regulating the militia forces.

A mariner ſhould neither be arreſted, nor taken forth of a ſhip ready to ſail, for any debt; but only his hire, and as much other goods as he has in the ſhip, he may be arreſted for, according to the value of the debt, and the maſter to be anſwerable for all; becauſe a ſhip is compared to a man's dwelling houſe, which is his ſure refuge by the law, except it be for a ſworn debt, or a penalty to the King through a crime. *Mal. Lex Merc.* 105. *chap.* 23.

By *ſtat.* 31 *Geo.* 2. *c.* 10. *ſect.* 28. 1 *Geo.* 2. *ſtat.* 2. *c.* 14. *ſect.* 15. No ſeaman ſhall be liable to be taken by any proceſs or execution whatſoever, in any part of his majeſty's dominions, (other than for a criminal matter) unleſs ſuch proceſs, *&c.* be for a real debt, or other juſt cauſe of action; and unleſs, before taking out ſuch proceſs, (not being for a criminal matter) the plaintiff, or ſome other perſon, (ſo in the act) on his behalf, make an *affidavit*, that to his knowledge the debt is juſtly due, or the debt, or damages and coſts, for which the execution is iſſued, amounts to 20*l.* at leaſt; a memorandum of which oath is to be marked on the back of the writ.

A defendant

A defendant being a ſeaman in actual ſervice of the King, was arreſted and held to bail in the *Palace Court*; he removed the action by *habeas corpus*, and was diſcharged by this court on a common appearance, according to *ſtat.* 1 *Geo.* 2. and *ſtat.* 2 *Geo.* 2. *c.* 14. *ſect.* 15. the debt being under 20*l.* The plaintiff objected, that the defendant had abſented himſelf *two days* after his time of leave given. But the court held, that the ſervice continues whilſt the defendant's name remains in the ſhip books. 2 *Barnes* 71.

By *ſtat.* 12 *Geo. c.* 29. *ſect.* 1. No perſon ſhall be held to ſpecial bail upon any proceſs iſſuing out of any ſuperior court, where the cauſe of action ſhall not amount to 10*l.* nor out of any inferior court, where the cauſe of action ſhall not amount to 40*s.* And in all caſes where the cauſe of action ſhall not amount to 10*l.* in a ſuperior court, or to 40*s.* in any inferior court, (and the plaintiff ſhall proceed by way of proceſs againſt the perſon) he ſhall not arreſt the body of the defendant, but ſhall ſerve him perſonally, within the juriſdiction of the court, with a copy of the proceſs; and if ſuch defendant ſhall not appear at the return of the proceſs, or within *four days* after, it ſhall be lawful for the plaintiff, on *affidavit* being made and filed of the perſonal ſervice of ſuch proceſs, (which affidavit ſhall be filed *gratis*,) to enter a common appearance, or file common bail for the defendant, and to proceed thereon as if ſuch defendant had entered his appearance, or filed common bail.

Where a debt is 10*l.* or upwards, by the courſe of the court, ſpecial bail is required, or otherwiſe not. It is not common, where an action of debt is brought on a bond of 20*l.* *conditioned* for the payment of *nine pounds*, to hold to bail; for though the penalty, which is the legal debt, exceeds *ten pounds*, yet the real and equitable debt is leſs. But on ſome particular caſes, as where it is to be feared a perſon will run away, *&c.* the court will hold to bail, if the legal debt exceeds *ten pounds*. 10 *Mod.* 24.

By *ſtat.* 5 *Geo.* 2. *c.* 27. *ſect.* 5. Where the cauſe of action ſhall not amount to *ten pounds* in any ſuperior court, or to *forty ſhillings* in any inferior court, no ſpecial writ nor proceſs, eſpecially expreſſing the cauſe of action, ſhall be iſſued; and every attorney or officer of ſuch court, ſuing forth or iſſuing any ſuch proceſs, ſhall forfeit *ten pounds* to the perſon aggrieved.

By *ſect.* 2. In all caſes where the plaintiff's cauſe of action ſhall amount to 10*l.* or 40*s.* as aforeſaid, *affidavit* ſhall be made and filed of the cauſe of action, (which *affidavit* may be made before any judge or commiſſioner of the court, out of which ſuch proceſs ſhall iſſue, or elſe before the officer who ſhall iſſue ſuch proceſs, or his deputy,) and for ſuch *affidavit* 1*s.* over and above the ſtamp duties ſhall be paid, and no more; and the ſum ſo ſpecified in ſuch *affidavit* ſhall be indorſed

ſed on the back of ſuch writ or proceſs, for which ſum ſo indorſed the ſheriff, &c. ſhall take bail, and no more, but if any writ or proceſs ſhall iſſue for 10*l.* or upwards, and no *affidavit* or indorſement ſhall be made as aforeſaid, the plaintiff ſhall not proceed to arreſt the body of the defendant, but ſhall proceed in like manner as is by this act directed in caſes where the cauſe of action does not amount to 10*l.* or 40*s.* as aforeſaid."

In an action for money won at play, *Gould* and *Turton*, juſtices, were for denying ſpecial bail, for ſince the plaintiff played on tick, they would not help his ſecurity; but *Holt*, C. J. ſaid—The practice has been otherwiſe, and the contract, if under 100*l.* is lawful, and the plaintiff ventured his money againſt it; and to ſay they were not to better his ſecurity, would as well prove there ſhould be no bail on an *indebitatus aſſumpſit*, &c. *Salk.* 100. *pl.* 10.

*Holt*, C. J. ſaid, they never ought to enter into the merits of a cauſe on a queſtion about bail; for to order common bail on merits, would ſlur a man's cauſe of action, and no man ought to have his cauſe tried with diſparagement on it; and though this may be for money won at play, yet it was a lawful contract which *ſtat.* 16 *Cha.* 2. *c.* 7. *ſect.* 3. allowed of, and no man ought to be wiſer than the law; and this was giving money againſt money, for which an *indebitatus aſſumpſit* would not lie, but an action on the ſpecial contract; and to ſay that becauſe he depended on the defendant's word at firſt, he therefore ſhould have no ſpecial bail, would be a reaſon why there ſhould be no ſpecial bail in any ſimple contract: here ſpecial bail was ordered, and it was ſaid to be ordered in the like caſe in the *Common Pleas.* 12 *Mod.* 295.

In an action of debt for 200*l.* upon the game act; *viz. ſtat.* 9 *Ann. c.* 14. the defendant was arreſted on an *affidavit*, that he was indebted to the plaintiff in 151*l.* 4*s.* for money won of him at play, without mentioning how much was won of him at each time. It was moved, that the bail-bond might be delivered up, and common bail accepted; and it was ſaid, that in actions on penal ſtatutes ſpecial bail is never required; and this he inſiſted was the preſent caſe, the money for which the action is brought not being due as on a contract, but given by the ſtatute to the loſer; and if he does not ſue, to any other perſon: and therefore it is to be conſidered as a penalty.

On the other ſide it was urged, that although it muſt be admitted, where a penalty is given to common informers, ſpecial bail is not required, yet it is otherwiſe, where it is given to the party aggrieved. And in this caſe the money ſued for is not properly a penalty, but is to be conſidered as received by the defendant for the uſe of the plaintiff, as he came by it by unlawful means. And it is like the caſes, where money is paid by compulſion, or without conſideration. If the action had been brought by an informer, the money ſued for muſt indeed be regarded as a penalty, becauſe he never had

a property in it; but it makes a great difference, here the loſer is the plaintiff: and the ſame ſtatute may in one part be *remedial*, and in another *penal*.

And on the ſame ſide an *affidavit* was produced, that *one hundred and forty-nine pounds* were won at one time, and ſeveral other ſums at other times, amounting to more than *ten pounds* at each ſitting; all which together made up the ſaid *one hundred and fifty-one pounds four ſhillings*; and that the ſaid money was loſt within *three months* before the bringing of the action. And though it was objected to the reading of this *affidavit*, as being contrary to the practice, yet the court permitted it to be read, as it was explanatory only. 2 *Stra.* 1157. *Barnard. Caſes in the K. B.* 438.

When this cauſe was firſt argued, the court (*Lee* Chief Juſtice being abſent) ſeemed divided in opinion. *Page* Juſtice was of opinion, that the plaintiff was entitled to bail, for that the act makes the money won a debt; and it has in effect enacted, that the winner owes ſo much to the loſer. 2 *Stra.* 1079. But *Probyn* and *Chapple*, Juſtices, ſeemed inclined to the contrary, becauſe here the property of the money was abſolutely diveſted; and therefore this caſe materially differs from thoſe where money is paid without conſideration: and conſequently there is no difference, as to the preſent point, between common informers and the perſon aggrieved. And *Chapple*, J. ſaid, that it was determined in the *Common Pleas*, by the Lord Chief Juſtice *Eyre*, that if more than *ten pounds* is won, and no ſecurity given, the winner notwithſtanding the ſtatute, may recover the money by an action. And *Chapple*, Juſtice, ſaid, he was of the ſame opinion; and that in ſuch caſes the loſer cannot recover the money back again, the ſtatute extending only to ſuch caſes where the money is paid.

However, the matter in queſtion being a new point, the caſe was then adjourned; and in *Mich.* term 11 *Geo.* 2. it was again ſtirred and argued. Determined by *Lee*, Chief Juſtice, and the whole court, that as the loſer is entitled by the ſtatute to an action for the money loſt, as for money received to his uſe, and the money is therein conſidered as a debt, the act is not penal, but more properly remedial, 2 *Stra.* 1079. and therefore the plaintiff is entitled to bail. And the rule before granted to ſhew cauſe for giving up the bail bond, was now diſcharged. *Andr. Rep.* 70. *Salk.* 100. *pl.* 10.

The plaintiff had made an *affidavit* that the defendant was indebted to him in a large ſum of money, which was ordered to be paid by a ſentence of the bailiff of *Mendon*, in *France*, as a compenſation for not making good a charge againſt the plaintiff for bigamy. The defendant had appealed to the parliament of *Paris*, and it appeared by the acts of that court, that the ſentence of the bailiff of *Mendon* was annulled, (not upon the merits, but according to the cuſtom of the ſu-

perior courts, who on an appeal from an inferior juriſdiction, conſtantly annul the former ſentence, and proceed as in an original ſuit) and the queſtion was, Whether the defendant ought to be held to bail or not? Lord Chief Baron *Denton*, and *Comyns*, were of opinion, that as the ſentence of the bailiff of *Mendon* appeared to be annulled, and not in force, it was not neceſſary for the court to conſider whether this ſentence, when in being, would have been a ſufficient cauſe of action to hold the defendant to bail, but looked on the ſentence as diſcharged and made void; and therefore ordered a common appearance to be accepted. Mr. Juſtice *Forteſcue* was of opinion, the defendant ought to be held to bail. *Barnes, C. P.* 68.

Sir *John Strange* reports the ſame caſe (which he ſays was in *Mich.* term, 19 *Geo.* 2. and not *Hilary*, 10 *Geo.* 2. as *Barnes* has it) as follows, That it was an action for 2500 l. for a malicious proſecution recovered in the ſaid court of *Mendon*, and that the *affidavit* for holding the defendant to bail, was for ſo much money due to him on a *judgment* or *decree*; and the court held, that it did not warrant holding to bail, for on a *decree* here there can be no bail; and whatever might be the caſe of a money debt contracted and ſued for abroad, yet this being a caſe of damages for a malicious proſecution, could never be conſtrued to raiſe a debt here: ſo common bail was ordered. 2 *Stra.* 1243.

If on examination before a judge, the perſon does not make out a good cauſe of action, common bail ſhall be ordered. 12 *Mod.* 526.

*Holt* Chief Juſtice, ſaid, on a conteſt about common or ſpecial bail, if it does not appear that the plaintiff has miſconceived his action, and that if any action lies, it is of another ſort, there common bail ought to be accepted. *Vide Mod. Rep.* 579.

One ſummoned before a judge, to ſhew cauſe why common bail ſhould not be taken, did not come; whereon a day was given for him to come, or elſe that common bail ſhould be taken; he comes before the day, and conſents to common bail, which was accordingly filed; and at the day came to make oath of a debt above 10 l. *Per curiam*—He ought not to be received, bail being regularly filed. 12 *Mod.* 324.

A joint demand will not warrant bail in ſeparate actions. *Barnes* 64.

On an action againſt a maſter of a ſhip for embezzling goods he had on board, he was held to ſpecial bail by *Holt* C. J. 12 *Mod.* 527.

But if it were for negligently keeping, common bail would have done. *Ibid.*

By the court—If one has ſeveral cauſes of action, each whereof is too ſmall for ſpecial bail, he cannot join them to enforce ſpecial bail. *Ibid.* 527. See *Barnes* 64. *S. P.*

*Holt*

*Holt* chief juſtice: if the declaration don't agree with the *acetiam*, there ſhall be only common bail. *Comb.* 131.

*By ſtat.* 11. *and* 12 *Wm.* 3. *cap.* 9. *ſec.* 2. No ſheriff or officer within the ſaid principality, or *counties palatine*, upon any writ or proceſs iſſuing out of any of his majeſty's courts of record at *Weſtminiſter*, ſhall hold any perſon to ſpecial bail, unleſs *affidavit* be firſt made in writing, and filed in that court out of which ſuch proceſs is to iſſue, ſignifying the cauſe of action, and that the ſame is *twenty pounds* and upwards; and where the cauſe of action is *twenty pounds*, bail ſhall not be taken for more than the ſum expreſſed in ſuch affidavit.

A rule to ſhew cauſe why a common appearance ſhould not be accepted for the defendant, who had been arreſted in the county palatine of *Durham*, and the ſum ſworn due, being under *twenty pounds*, made abſolute. For the plaintiff it was urged, that ſtatute 11 & 12 *W.* 3. *c* 9. *ſec.* 2. requiring no ſheriff to hold to bail in counties palatine, on proceſs out of *Weſtminiſter hall* under 20 *l.* was virtually repealed by ſtatute 12 *Geo. c.* 29. and made perpetual by 21 *Geo.* 2. *c.* 3. which requires bail in all caſes, where *affidavit* ſhall be made that the cauſe of action amounts to *ten pounds*, and the latter being a general law, and extending throughout *Great Britain*, (*Scotland* only excepted.) *Barnes's notes C. P.* 62. *By the court.*

Affirmative words, without negative ones, are not ſufficient to repeal a former law; the nature of the caſe, and the intent of the legiſlature, are to be conſidered.

Both the ſtatutes have the ſame title, *viz. to prevent vexatious arreſts*; and both were made in favour of the liberty of the ſubject: therefore they may ſtand together.

In a *county palatine*, *twenty pounds* muſt ſtill be ſworn due to require bail. (It has been ſo held in the *Exchequer*,) *Barnes's notes C. P.* 22. By a rule of this court, *Michaelmas* 1654, bail is required for *twenty pounds*, and no leſs. (See *Rules, Orders, &c. in the Common Pleas, edit.* 1742.) And though a practice was introduced in Chief Juſtice *North's* time to hold to bail for 10 *l.* (*Gilb. Hiſt. C. P.* 37.) yet the old rule remains undiſcharged. 2 *Barnes* 62.

On a penal ſtatute, the defendant is not to be held to bail (as 13 *Eliz. c.* 5. made perpetual by 29 *Eliz. c.* 5. of fradulent conveyances, ſaid to be according to the practice in *K. B. Yelv.* 53. *Danv. Abr.* 680. nor on 2 *Geo.* 2. *c.* 23. *ſec.* 26. made perpetual by 30 *Geo.* 2. *c.* 19. *ſect.* 75.) for 50 *l.* penalty for defendant's practiſing as an attorney, not being duly admitted, becauſe it is for a fine or amerciament, and is in the nature of a *qui tam. Barnes* 81. But the defendant may be arreſted on *ſtat.* 10 & 11 *W.* 3. *c.* 10. for an of-

fence in the exportation of wool; and then, not only the penalty, but the cauſe of action, ought to appear in the writ, and the defendant ought not to be arreſted on a general *latitat*, with an *acetiam billæ*, becauſe the penalty on a ſtatute is in the nature of a fine or amerciament ſet on the party for an offence committed, and therefore no perſon ought to ſuffer any inconvenience by reaſon of ſuch law, till he is convicted of the offence, for then he would be liable to an action for a penalty, before it ought to be ſet. *Gilb. Hiſt. C. P.* 37. So held by Lord Chief Juſtice *Holt. vide* 12 *Mod. Rep.* 231.

In ſlander, no ſpecial bail, except in ſlander of title, which is to be left to the diſcretion of the judges. *By* rule of *Mich.* term 1654. 6 *Charles* 2. *K. B. & C. P. ſect.* 12. *Barnes* 79, 80. 11 *Mod.* 49. *pl.* 18.

On motion that defendant might put in good bail to the plaintiff's action, [This action was given by *ſtat.* 2 *Rich.* 2. *c.* 5. 12 *Rich.* 2. *c.* 11.] for although the action be but for words, yet the ſame being ſpoken againſt an Earl, the court may compel ſpecial bail; and it was granted, *unleſs cauſe ſhewn to the contrary.* *T. Raym.* 74. Denied in 11 *Mod.* 49. *pl.* 18. though the words were very bad, and implied treaſon. 3 *Mod.* 41. 2 *Mod.* 215.

In an action on the caſe for calling a woman of quality whore, whereby ſhe loſt her marriage, it was ruled on motion, that the defendant ſhould find ſpecial bail; though generally in actions for words, no ſpecial bail is uſual, yet on the circumſtances of the caſe, the court may compel the defendant to find ſpecial bail. *Lev.* 39.

It was moved to have leave for charging *M.* being a priſoner in *Newgate*, with a *ſcandalum magnatum & acetiam billæ* of 100*l.* in order to hold him to ſpecial bail, for ſaying the *D.* of *S.* was a cheat, and had cheated the king and the army. *Holt C. P.*

This being a poor man, to charge him thus, will be a perpetual impriſonment to him; and ſpecial bail has often been demanded in theſe actions, yet it has been frequently denied. But he was ordered to find two that would ſwear themſelves worth *twenty-five pounds* each, and himſelf bound in *one hundred pounds.* 12 *Mod.* 420. *Holt* 640.

In all caſes where a priſoner in the *Fleet*, or other gaol or priſon is diſcharged, or ordered to be diſcharged by the court of *Common Pleas*, or any of the juſtices thereof, by warrant of *ſuperſedeas*, for want of proſecution, and ſuch priſoner be afterwards arreſted, or detained in cuſtody by action of debt, brought on a judgment obtained in the cauſe wherein ſuch priſoner was ſo diſcharged; a common appearance

pearance ſhall be accepted for the defendant in ſuch action of debt on judgment. *Vide rule* 2. *of Hil. term* 8 *Geo.* 2. 1734.

In debt on a bond, *non eſt factum* pleaded, and verdict and judgment for plaintiff to a *ſcire facias*. On this judgment the defendant pleaded bankruptcy, but the judgment was after; and the judge who tried the cauſe being of opinion againſt the defendant, there was a verdict for the plaintiff.

And now in an action of debt on the judgment, a motion was made that the defendant might be diſcharged on common bail, becauſe the bond, which was the foundation of the demand, was before the bankruptcy; *but not allowed.* For, *by the court*, we can look no farther backward than the judgment, and therefore there muſt be bail. *Stra.* 477.

A defendant, after judgment, ſurrendered himſelf in diſcharge of his bail, and lay two terms without being charged in execution; during which time the plaintiff brought an action of debt on the judgment, and after a recovery in that action, the defendant lay two terms more without being charged; and the plaintiff brought another action of debt on the ſecond judgment, whereon the defendant moved for a *ſuperſedeas* as to the two firſt actions, and that common bail might be accepted in the laſt; and on conſideration, both were granted.

It was agreed, that in the firſt action of debt on judgment, ſpecial bail might be required, but the court ſaid it would be a handle of oppreſſion, if they carried it any farther. 2. *Stra.* 782. *Barnard K. B.* 22.

An action of debt was brought on a judgment after a writ of error, and bail put in thereon; but no bail was given in the original action: and the queſtion was, whether bail being put in on the writ of error, the defendant ought to be held to bail in the action on the judgment? It was urged for the defendant, that according to the courſe of the court, where bail is given in the original action, no bail is required in the action on the judgment; and the bail in error, who are bound for the debt and coſts, and cannot ſurrender the principal, are a better ſecurity than bail in the original action.

*By the court:* no inſtance can be ſhewn, where bail put in on a writ of error has been held ſufficient to excuſe bail in an action of debt on judgment. Therefore the defendant was held to bail. It was ſaid for the plaintiff, that in caſe the writ of error ſhould be *non pros'd* for want of tranſcribing the record, the bail would not be liable; but the law is otherwiſe, and the bail being found to proſecute

the writ of error with effect, are liable in case of a *non pros.* 2 *Barnes*, 65. *Com. Rep.* 556. *Pract. Reg. C. P.* 57.

The bail in an action of debt on judgment discharged, there being bail in the original action, and the plaintiff therefore is not entitled to bail on the judgment. 2 *Barnes* 93.

If there was bail in the original action, then no bail is required in the action on judgment; but if no bail in the original action, then bail is to be put in, where the debt is above 10 *l.* (the money recovered) and an *affidavit* made thereof. *Rep. and Cas. of Pract. in C. P.* 32, 77. *Pract. Reg. in C. P.* 54, 56. but see *Rule* 2. *of Hilary term*, 8 *Geo.* 2. 1734. *in C. P.*

The defendant had been discharged out of custody for not having been charged in execution in due time; and now the plaintiff brought debt upon the former judgment: upon which it was moved, that the defendant might be admitted to common bail. But the court refused the motion, by reason that this was not the second action brought on the judgment, but the first; and for this purpose Judge *Lee* mentioned the case of *Chambers* v. *Robinson*, 2 *Stra.* 782. *Barnard K. B.* 22. However, afterwards the court made a rule to shew cause. 2 *Barnard K. B.* 369.

On cause being shewn, it was said, that if this had been the second action upon the judgment, the defendant must have been discharged on common bail; but as it is only the first, it was conceived that special bail was due. For this purpose the case of *Townshend* v. *Mason*, was mentioned, where Judge *Raymond* refused to discharge a defendant at his chambers, on common bail, under the same circumstances, the court was of the same opinion; accordingly the rule was discharged.

On an action on a judgment obtained against the defendant for *nine pounds* debt; and the debt, with the addition of costs, amounting to more than 10 *l.* the defendant was arrested. And it was moved, that the defendant might be discharged out of custody on filing common bail, and cited *Clever* v. *Jordan*, *Hilary term* 8 *Geo.* 2. where the debt was brought on a judgment, in order to prevent the defendant's taking advantage of the Lord's act, which he might have done on an execution; and the original debt, with the costs, (but not without) amounting to more than *ten pounds*, the defendant was arrested, and put in bail, and afterwards was surrendered in discharge of his bail: and after that he was ordered to be discharged out of custody, on filing common bail. *Andr.* 15.

It was admitted on the other side, that where the original debt does not amount to *ten pounds*, but with the costs amounts to more, the

the defendant is not obliged to put in ſpecial bail: and ſo it was determined in the caſe of *Gammage* againſt *Watkins*, *Eaſter term*, 7 *Geo.* 2. and another caſe ſince. But he argued that here bail being put in above, and the defendant having voluntarily ſurrendered himſelf, [and ſo it was ſworn] it is too late for him to pray a diſcharge. And he compared it to the caſe of an executor, who on a writ of error puts in bail, which he was not obliged to do; and afterwards it was moved to diſcharge the bail, but denied. *Raym.* 1459. 2 *Stra.* 745.

*Per curiam*—It is moſt probable that the bail below put themſelves in as bail above, and afterwards ſurrendered the defendant.

But ſuppoſing it was all the defendant's own act, it makes no difference, the whole being compulſory, as it aroſe from a wrongful procedure at firſt.

He ought therefore to be diſcharged; and this is the conſtant practice, where the debt for which the judgment was obtained is under 10 *l.* And a rule was granted accordingly. *Andr.* 15. 2 *Stra.* 1077.

On a motion for a ſpecial *latitat*, with an *acetiam*, where the party intended to declare in treſpaſs only, on a ſurmiſe of there being great *mayhem*; the court ſaid, that on *affidavit* thereof, they would make one with an *acetiam*, and ſo there ſhall be ſpecial bail: *Sid.* 276. *pl.* 4. *Gilb. Hiſt. C. P.* 36, 37.

In treſpaſs, bail is at the diſcretion of the court. *Rule Mich. term* 1654. *ſect.* 12. 6 *Char.* 2. *Trin.* 24 *Eliz.* 1583. 2 *Keb.* 101. *pl.* 28.

On a motion for a common appearance. The plaintiff's *affidavit* ſet forth, that the defendant entered the plaintiff's hop-ground, and did take and carry away, ſeveral thouſand hop-poles, to his damage of 20 *l.* The court ſaid, *ſtat.* 12 *Geo. c.* 29. made perpetual by 21 *Geo.* 2. *c.* 5. did not diſtinguiſh actions, but that the plaintiff might hold to bail in *treſpaſs*, as well as in any other action. *Caſ. of Pract. C. P.* 106. *Pract. Reg. C. P.* 64. It was alſo declared there was no occaſion to have a judge's order. *Barnes* 55.

By rule *Mich.* term 1654. on a motion for ſpecial bail, on an *affidavit* that the cauſe of action was battery and wounding, and that there were ſeveral wounds given by a ſword, whereby the plaintiff was in danger, *&c.* It was urged that ſpecial bail was granted about *ten years* ago, on the like motion in the caſe of *Paiton*, in which one was hung up upon a tenter-hook in the *Butcher-row*, in the night; and it was doubted whether it could be granted, ſince ſtat.

13 *Char.*

13 *Char.* 2. *ſtat.* 2. *c.* 2. concerning the *latitat and bail* thereon; and it ſeemed that it might, becauſe it was ſaid that the ſtatute was intended to prevent oppreſſion in the country, by requiring exceſſive bail: therefore they ordered the defendant to give ſpecial bail. *Sid.* 307. *pl.* 10.

No ſpecial bail of courſe in an action of battery, but it muſt be applied for and obtained by ſpecial motion and order. *Rule Mich.* 6 *Char.* 2. 1654. *K. B. Gilb. Hiſt. C. P.* 37.

*Holt, Chief Juſtice*, ſaid, when people come to him for bail, they muſt be content with bail of reaſonable value, and not inſiſt on their worth in proportion to the ſum charged. And ſaid, he wiſhed attornies would beware of charging extravagant *acetiams*, for otherwiſe an action on the caſe would lie for holding to exceſſive bail. 6 *Mod.* 267. 12 *Mod.* 257, 273. 2 *Keb.* 101. *pl.* 28, 108.

Special bail in battery, for putting an arm out of joint, denied. But granted for a foul battery againſt a man and his ſervant. *Mod.* 2. *Comb.* 57.

*Holt*, Chief Juſtice ſaid, when people come to him for leave to charge defendants with *acetiams*, in caſes of outrageous batteries, he would give leave to charge them with a good ſum. 6 *Mod.* 266.

The court refuſed to hear *affidavits* againſt an outrageous battery, being only to prevent ſpecial bail. 2 *Keb.* 108 *pl.* 46.

In debt, bail is of courſe. *By rule Mich. term* 1654. *ſect* 12. 6 *Char.* a. *Trin.* 24 *Eliz.* 1582. 10 *Mod.* 24.

In an action on a replevin bond, common bail ſhall be filed. *Salk.* 99. *pl.* 8. *Carth.* 519. *Holt* 127. 12 *Mod.* 320, 380.

In *detinue*, bail is at diſcretion of the court. *Same rules.*

In a ſpecial action on the caſe, bail at diſcretion. *Same rules.*

In conſpiracy, no ſpecial bail of courſe, without ſpecial motion and order. *Rule Mich. term* 1654. *ſect.* 12. 6 *Char.* 2. *K. B. & C. P.*

A Judge at his chambers will order ſpecial bail, if he thinks fit, which the defendant has a right to apply to the court to get diſcharged, if not well founded. *Barnes* 48.

In an action of conſpiracy, ſpecial bail was prayed on a malicious indictment, to charge the plaintiff as a ſpiriter awory of children, the defendant

defendant being going beyond ſea, which the court refuſed, being a bare conſpiracy. In the *Exchequer*, in *Adam's* caſe, it was granted, he being impriſoned *four months* for ſuſpicion of treaſon, and diſcharged by the King and council. 2 *Keb.* 794.

In an action for falſe impriſonment, no ſpecial bail of courſe, without ſpecial motion and order. *Mich. term.* 1654. *ſect* 12. 6 *Char.* 2. *K. B. & C. P.*

By *ſtat.* 4 *Geo.* 2. *c.* 28. *ſect.* 1. "in caſe any tenant for life or years, or other perſon, who ſhall come into the poſſeſſion of any lands, tenements, or hereditaments, under or by colluſion with ſuch tenant, and wilfully holds over after the determination of ſuch term, and after demand made in writing for delivering the poſſeſſion thereof by the perſon to whom the remainder or reverſion ſhall belong, or his agent; ſuch perſon holding over ſhall pay double the yearly value of the lands, *&c.* ſo detained, to be recovered by action of debt, whereunto the defendant ſhall be obliged to give ſpecial bail, againſt which penalty there ſhall be no relief in equity."

On a motion in the treaſury for bail in an action for *meſne* profits, after a recovery in ejectment on the leſſor of the plaintiff's *affidavit*, that the *meſne* profits amounted to 89 *l.* Bail was ordered for 80 *l.* This is a cauſe of action which is bailable, or not, at the diſcretion of the court, or a judge. *Barnes* 88 *Pract. Reg. C. P.* 62. *S. P.*

The defendant was held to bail by a judge's order, in an action for *meſne* profits, after a judgment in ejectment againſt the caſual ejector by default, but diſcharged by the plaintiff's conſent on a common appearance, the *acetiam* being in *caſe* inſtead of treſpaſs only. 2 *Barnes* 59.

It was obſerved *by the court*, in this caſe, that theſe actions for *meſne* profits (which are grown very faſhionable) tend to create double expence. They obſerved that the plaintiff ſhould be ready at the trial of the ejectment, to prove his damages, which may be recovered in that action, without bringing a ſecond for *meſne* profits? The true rule as to the time from which *meſne* profits are to be recovered, ſeems to be where judgment is againſt the caſual ejector, from the time of the delivery of declarations to the tenants in poſſeſſion, or from the time of an actual demand of poſſeſſion proved, where judgment is againſt the tenants in poſſeſſion (or the landlord defending in their ſtead) from the *ouſter* admitted by the common conſent rule; but in neither caſe from the demiſe, which may be laid back at the plaintiff's pleaſure. 2 *Barnes* 59. See *id.* 369.

In an action of covenant, the defendant is not bound to put in ſpecial bail, unleſs the plaintiff has obtained a rule of court, or an

order from a judge for that purpoſe, or unleſs the covenant be for payment of money, until the declaration is delivered. Rule *Mich.* term 1654. *ſect.* 12. 6 *Char.* 2. 12 *Mod.* 30.

On a motion for bail on a writ of error in an action of debt on bond; conditioned for payment of 300 *l.* mentioned in a ſurrender of a copyhold by way of mortgage, and not for performance of covenants, wherein judgment had paſſed by default.—*Per curiam*, there muſt be bail. This caſe is out of ſtatute 16 & 17 *Char.* 2. *chap.* 8. made perpetual by 22 & 23 *Char.* 2. *c.* 4. but within ſtatute 3 *James*, *chap.* 8. made perpetual by 3 *Char.* *chap.* 4. *ſect.* 4. *Barnes.* 78.

In debt on bond to perform covenants, no bail ſhall be given, but with reſpect to the breaches, and the damage done thereby. *Sid.* 63. *pl.* 38. *Noy's Rep.* 88 *Lev.* 300. And the meaſure of ſuch damages ſhall be from plaintiff's oath. *Salk.* 100 *pl.* 11.

On an action of covenant brought by the plaintiff, who was patentee of *Drury-lane* play-houſe, againſt the defendant for not performing certain dances on the ſtage according to articles entered into between them, whereby the plaintiff ſwore himſelf damnified 100 *l.* the defendant moved in the treaſury for a common appearance, but did not obtain a rule, the plaintiff having ſworn to a certain damage. *Barnes* 58.

The plaintiff ſwore the defendant covenanted to pay him 315 *l.* for the purchaſe of land; that he had been always ready to convey the eſtate on payment of the purchaſe money, but the defendant refuſed, whereby the plaintiff ſwore himſelf damnified 40 *l.* The common appearance ordered. There being no previous application to a judge, and the damages were uncertain. Old caſes are not to be followed where the damages can be reduced to a certainty; as in covenant for the payment of money, or where a tenant covenants with his landlord to pay a certain ſum for every acre of land he plows up, or the like, the plaintiff is entitled to bail, otherwiſe not, eſpecially without a judge's order being previouſly obtained. It is not reaſonable that the defendant ſhould be held to bail for ſuch damages as the plaintiff fancies he has ſuſtained, and he is pleaſed to ſwear to. 2 *Barnes* 94.

So in an action on a bond to ſave harmleſs, the plaintiff muſt ſwear *poſitively* and *certainly*, how, and for how much he is damnified; for the court cannot take it by implication. 2 *Barnes* 97.

In an action of covenant, the plaintiff made *affidavit* that the defendant was his tenant, and that he had broke ſeveral covenants in his leaſe, to his damage of 100 *l.* and thereon held him to ſpecial bail. It was moved that the defendant might be diſcharged on common bail; becauſe the damages were merely uncertain, and the plaintiff had obtained no order of a judge, whereby ſpecial bail was required.

In

In covenant for rent he did agree it was otherwiſe. Accordingly a rule was made to ſhew cauſe; and afterwards it was made abſolute. 2 *Barnard. Rep. K. B.* 325.

A defendant was held to bail in an action for the penalty of 100*l.* for not delivering goods of 300*l.* value, within a certain time, purſuant to an agreement in writing. 2 *Barnes* 56.

Bail in *Trover* with an *acetiam* is of courſe. *Barnes* 80.

It was held, that on a proper *affidavit* the writ may be marked for bail in *Trover*, without an order of the court, or of a judge at his chambers; for it is more an action of property, than a *Tort*. 2 *Stra.* 1192. 6 *Mod.* 14.

The plaintiff brought an action of *Trover* againſt a defendant in the *Poultry Compter* in *London*, for goods of great value. The defendant removed the cauſe by *habeas corpus* into the *King's Bench*. And he moved there to be diſcharged on common bail; becauſe he ſeized theſe goods as judge of the admiralty in *Penſylvania*, they being condemned there by ſentence; and the ſaid ſentence affirmed here upon an appeal by Sir *Charles Hodges* The plaintiff made *affidavit* of the value of the goods to be 100*l.*

*Holt Chief Juſtice*, the practice is, that if the plaintiff does not ſhew his cauſe of action on ſummons, the defendant ſhould be diſcharged on common bail, notwithſtanding that the cauſe is removed from an inferior court.

Here the defendant, having acted as a judge, he is not liable to an action. But bail was ordered to be put in for 500*l.* becauſe if the defendant acted as a judge, he will be out of any danger of an action; but if he did not act as a judge, then it was very reaſonable that ſpecial bail ſhould be put in. 12 *Mod.* 526. 2 Ld. *Raym.* 767.

An action of *Trover* was brought by the preſent plaintiff, againſt one *M.* wherein he obtained judgement by default, and afterwards had final judgment; whereon a writ of error was brought, and another action of *trover* was now brought by the ſame plaintiff, and for the ſame gods for which the firſt action was brought againſt *B.*

It was thereon moved, on an *affidavit* that the goods converted amounted to more than 10*l.* that the defendant might be held to ſpecial bail. And it was compared to the caſe of an indorſee of a bill of exchange, who may bring an action both againſt the drawer and indorſer, and hold them both to bail.

And *Stra.* 515. was cited, where on a motion to ſtay proceedings it was held, that an indorſee of a bill of exchange may bring an action thereon, both againſt the indorſor and drawer; and the court is only to ſee, that the plaintiff has but one ſatisfaction. So here plaintiff may ſue both *M.* and the preſent defendant, and is entitled to the ſame proceſs againſt the laſt, as if the action had been brought againſt him only.

And it was urged, in anſwer to an objection made by *Page*, juſtice, that by a judgment obtained by the plaintiff in *Trover*, the goods are become the defendant's; that a ſpecial property only is thereby veſted in him: and in the preſent caſe, it is evidence only of a property, as between the plaintiff and *M.* but not as between the preſent parties.

*Per curium*—The property of the goods is entirely altered by the judgment obtained againſt *M.* and the damages recovered in the firſt action are the price thereof; ſo that he has now the ſame property therein as the original plaintiff had; and this againſt all the world. And therefore the motion was denied.

It was urged for the defendant, that the plaintiff is not entitled to ſpecial bail, becauſe he would have bail on bail. *Andr. Rep.* 18. 2 *Stra.* 1078.

In an action of account, the plaintiff inſiſted on ſpecial bail, becauſe the defendant would go beyond ſea; but denied by the court; for in account no ſpecial bail is to be given, till judgment. *Pract. Reg. C. P. quoad computet*, 2 *Rol. Rep.* 53. *Lev.* 300. *Keb.* 99. *pl.* 93. 2 *Keb.* 335. *Noy Rep.* 28. *Ventr.* 103. where ſpecial bail was diſcharged, and ſaid that if the plaintiff would have ſpecial bail, he muſt arreſt the defendant again in an action on the caſe.

In *aſſumpſit* bail is of courſe. *Barnes.* 80.

The defendant was held to bail by the lord chief juſtice's order, on *affidavits* of a criminal converſation with plaintiff's wife. The defendant afterwards applied to the lord chief juſtice, on *affidavits* of himſelf and the plaintiff's wife, that plaintiff having been long beyond ſeas, and the wife having had advice of his death, received defendant's addreſſes, and married him as her ſecond huſband; the lord chief juſtice ordered the defendant to apply to the court, and on reading *affidavits*, and hearing counſel on both ſides, the chief juſtice was of opinion, that the order for bail ought to be diſcharged, nothing criminal appearing in the defendant; and in caſes of this kind, which differ from actions brought on contracts, no bail is required, unleſs by the ſpecial order of a judge, which the defendant has a right to apply to the court to diſcharge, if not well founded.

*Forteſcue* and *Reeve juſtices* thought that entering into the foundation of the order, was examining the merits of the cauſe; and therefore improper before the trial. However, the defendant was held to bail, and had four days time given him to put in the ſame. *Barnes* 47. *Pract. Reg. C. P.* 63.

It was moved for a ſpecial *aceitiam* in treſpaſs, for lying with the plaintiff's wife, which was granted; and the defendant was held to 50 *l.* bail.

*N. B.* *Affidavits* were produced of the indecent liberty they took together. 11 *Mod.* 275. *pl.* 24.

Bail was ordered for 200 *l.* in an action for a malicious proſecution for forgery, on the plaintiff's *affidavit*.

The defendant moved for a common appearance; and it appearing that the plaintiff was not acquitted of the indictment on the merits, but on a flaw, and no precedent being produced of an order for bail in ſuch an action as this, (though for falſe impriſonment there was) the rule to ſhew cauſe, why a common appearance ſhould not be entered, was made abſolute. *Barnes* 74. *Rep. and Caſ. of Pract.* 148. *Pract. Reg. C. P.* 66.

A plaint was levied in an inferior court before a debt contracted, and an arreſt on a proceſs on the plaint adjudged ill by the court. 7 *Mod.* 55.

The defendant covenanted to pay to the plaintiff a ſum of money on the 24th of *June*; whereon the plaintiff takes out a *latitat*, teſted the 3*d.* of *May*, returnable the laſt day of *Trinity* term following, and arreſted the defendant on it: which being made appear to the court, they diſcharged the arreſt: for though it is allowed a man may take out a *latitat* before the money is due, yet the party muſt not be arreſted upon it. 8 *Mod.* 343. *Barnard. Rep. K. B.* 57.

And this differs from an original, which if it be teſted before the money is due, it is abateable; but the *latitat* is only to bring him into cuſtody, that the plaintiff may declare againſt him by bill, and after that the proceedings on the *latitat* ceaſe.

By the cuſtom of *London*, the debtor may be arreſted before the money is due, to make him find ſurities. 8 *Co.* 126. *Hardr.* 303. *Hob.* 86. 11 *Hen.* 6. 3. *Bohun's Priv. Lond.* 79.

It was moved, that the defendant might have coſts, being put to the charge of motions to be diſcharged; but the court would grant none, it being but for taking out of the proceſs of the court. *Vent.* 28.

In treſpaſs and falſe impriſonment, the defendant, juſtified by an arreſt and a *latitat*; to which the plaintiff replied, that the writ was taken out after the arreſt; the defendant demurred.

*Per curiam*—The antedating of the writ will not ſuffice, if the proceedings be after, as in *H*'s caſe, an obligation not to proſecute before *Eaſter* term; the defendant ſaid, he did not; the plaintiff replies, that he ſued forth a writ returnable in *Eaſter* term, teſted in *Hilary* term; to which he appeared: and the defendant rejoined that he ſued forth the writ after the beginning of *Eaſter* term, which he is eſtoped to do, the firſt writ being his own, and the appearance is to that writ, therefore, though proſecuted by another in his name, it is not avoidable; and for the ſame reaſon he is concluded to ſay, that he ſued it out after *Eaſter* term. But a ſtranger is not concluded to ſay the writ was ſued out after; and ſo in this caſe eſpecially the *latitat* being not ſuable with any other *teſte* than of the precedent term; but an original may be teſted at any time: therefore judgment for the plaintiff, *niſi* 3 *Keb. Rep.* 213. *pl.* 21.

In an action of treſpaſs, aſſault and impriſonment, the defendant, as bailiff, of the ſheriff juſtified by *latitat*, teſted the 27*th* of *June* in *Trinity* term: the plaintiff replied, that the ſaid writ was ſued out on the 9*th* of *Auguſt*, which was after the arreſt of the plaintiff; to which the defendant demurred; and judgment prayed for the plaintiff.

*Per curiam*—This is an *eſtopel*, eſpecially in caſe of a bailiff, whoſe warrant might be before the arreſt, and all writs muſt be *teſted* as of term; and the ſheriff's not returning the writ, or not having any, ſhall not prejudice his under-bailiff. They obſerved, that a good action will lie againſt the ſheriff, or a bailiff of a franchiſe; and it was adjourned. 2 *Keb.* 173. *pl.* 56, 198. *pl.* 25.

" If any ſheriff, or other perſon, having authority to execute writs, make any warrant for the ſummons of any perſon, as upon any writ or ſuit, or for the arreſt or attaching of any perſon by his body or goods, to appear in any of the courts at *Weſtminſter*, or elſewhere, (not having before that the original writ or proceſs warranting the ſame) upon complaint thereof to the juſtices of *aſſize* of the county, or to the judges of the court out of which the proceſs iſſued, not only the party who made ſuch warrant, but the procurers thereof, ſhall be ſent for by attachments, or otherwiſe, as the judges ſhall think good, and be examined upon their oaths; and if the offence be confeſſed, or proved by witneſſes, the judges ſhall commit the offenders to the gaol of the county or court, where the ſame ſhall be examined, until they have ſatisfied the party aggrieved, not only the ſum of 10 *l.* but alſo all ſuch coſts and damages as the judges ſhall ſet down that the party hath ſuſtained thereby, and 20 *l.* a-piece

for

for their offence to the King." Stat 43. *Eliz. c.* 6. *See rule of Mich. ſect.* 2. 1654. *Hilary* 14 & 15 *Car.* 2. *Rule* 1.

*Note.* The ſaid rule literally was again in *Trinity* term, 1 *Jac.* 2. ſigned by the following judges, *Jones*, *Charlton*, *Levinz*, and *Street*.

By the *ſtat.* 6 *Geo. c.* 21. *ſect.* 53, 54. "No high-ſheriff, under-ſheriff, their deputies or agents, ſhall make out any warrants, before they have in their cuſtody the writs upon which ſuch warrants ought to iſſue, on forfeiture of 10 *l.* And every warrant, to be made out upon any writ out of the *King's Bench*, *Common Pleas*, or *Exchequer*, before judgment, to arreſt any perſon, ſhall have the ſame day and year ſet down thereon, as ſhall be ſet down on the writ, under forfeiture of 10 *l.* to be paid by the perſon who ſhall fill up or deliver out ſuch warrant."

An attorney of the *Common Pleas* brought an action againſt another, whereon he was arreſted in the country, and when he came to *London*, the attorney cauſed him to be arreſted again in *London* for the ſame debt; and this was ſhewn to the court, and the attorney called, to whom it was ſaid, "If a man be ſued here for a debt, after he be arreſted in another court for the ſame debt, the penalty is fine and impriſonment: and that is both the law and cuſtom of this court." And ſo the attorney was committed to the *Fleet*. *Goldſh.* 30.

If a defendant ſhall be lawfully delivered from an arreſt on any proceſs, the ſame defendant ſhall not be again arreſted at the ſame time by virtue of any proceſs, at the ſuit of the plaintiff; and if any attorney or plaintiff ſhall offend in the premiſſes, the name of ſuch attorney ſo offending ſhall be ſtruck out of the roll of attornies, and as well the ſaid attorney, as the plaintiff in the ſaid proceſs named, ſhall be reſpectively puniſhed, as to the court ſhall ſeem juſt. *Rule* 2 *of Mich. term.* 1663, 15 *Car.* 2. *K. B. Barnes notes*, 50.

The *affidavit* to hold to ſpecial bail being defective, *common bail* was ordered; and thereon the plaintiff on the 19*th* of *April* made a full *affidavit*, and took out a new writ, and held the defendant to bail: and the next day, the 20*th* of *April*, moved to diſcontinue on payment of coſts.

*Per curiam*—The plaintiff has been too quick, for he ſhould have had the coſts taxed and paid before he took out a new writ: therefore let the plaintiff pay him his coſts of this application. *Stra. vol.* 2. *p.* 1209.

In debt on a bond for 900 *l.* the defendant put in bail, who juſtified in court, and were allowed. The plaintiff finding they were forſworn, and worth nothing, diſcontinued; but before he had done

ſo, he arreſted the defendant in a ſecond action, and held him to bail, according to the above caſe, and obtained a rule to ſhew cauſe; when the whole villainy appearing, the court diſcharged the rule, and ſaid, *the plaintiff was right in laying hold of him as he did*; for had he diſcontinued before, the defendant would probably have run away. And therefore ordered he ſhould be held to ſpecial bail. 2 *Stra.* 1216. 2 *Barnard. K. B.* 396. *Supplem. to Lil. Abr.* 11, 12.

The defendant had been diſcharged out of cuſtody by a judgment in one of the courts of *Ireland*, on an act of parliament that paſſed laſt ſeſſions there, for ordering poor priſoners to be releaſed out of cuſtody. Notwithſtanding which he was ſince arreſted here by the ſame perſon, and for the ſame cauſe of action.

On which it was moved, that this court would diſcharge him on common bail; for that he ſubmitted it, this court would pay regard to the judgments in all foreign countries whatſoever.

The court ſaid, this was a proper rule in the *admiralty* juriſdictions, becauſe the law is in all places the ſame. But the *municipal* laws of diſtinct countries vary, and therefore they would not ſay whether there was any method, that could be taken in this kingdom, to make that judgment credited here.

However, this they ſaid was certain, that the defendant could not be diſcharged on motion upon it, for till the late acts of 2 *Geo.* 2. *c.* 20, 22. [long ſince expired] that paſſed here, they could not have done that in any ſuch caſe, and that the act does not extend to any caſe out of *England*. Accordingly the motion was refuſed. *Barnard's Rep. in K. B.* 420.

*By ſtat.* 8 *Eliz. c.* 2. *ſect.* 4. "If any man ſhall maliciouſly (for vexation and trouble) cauſe or procure any perſon to be arreſted or attached, to anſwer in the court of *King's Bench Marſhalſea*, *&c.* or in any of the ſaid courts, at the ſuit of any perſon, whereas there is none ſuch, or without the conſent and agreement of the party at whoſe ſuit ſuch arreſt or attachment is procured, the party ſo cauſing or procuring the ſame, and thereof convicted by indictment, or preſentment, on the teſtimony of two or more witneſſes, or other due proof, ſhall ſuffer *ſix months* impriſonment without bail, and ſhall not be enlarged till he has ſatisfied the party aggrieved his *treble* damages; and beſides ſhall forfeit unto the party in whoſe name the action was brought (if he be known) 10 *l.* to be recovered, as alſo the ſaid *treble* damages, by action of debt, bill, or plaint, in any court, againſt the party ſo offending, his executors or adminiſtrators, in which no eſſoign, *&c.* ſhall be allowed."

The

The queſtion was, how this proof ought to be in an action on the ſtatute, whether by collateral proof *before?*

And it was held, that the proof ſhall be in the ſame action, and not in any other courſe. Wherefore this exception being taken after verdict, it was *adjudged* to be well enough brought; and judgment for plaintiff. *Cro. Jac.* 188. *pl.* 11. *Id.* 381. See 10 *Ed.* 4. 11.

This caſe was cited in *Lutw.* 441. where in debt, the condition of a bond was to pay 200 *l. upon due proof of breach of any part of the articles*; and it was inſiſted that there ought to have been proof of the breach of ſome of the articles *before* the action was brought, *but not allowed*; for the proof may be in this ſame action; and the plaintiff had judgment by the opinion of all the court.

In an action on this ſtatute, the plaintiff declared that the defendant cauſed him to be arreſted at the ſuit of *A. B. C.* and *D.* where *B. C.* and *D.* never conſented to it, and that was for vexation, none of them having cauſe of action.

*Wray* and *Gaudy*, juſtices, held this out of the ſtatute, but the other juſtices within it; for one of the parties has colour, and may give ſufficient authority to arreſt him: and it cannot be ſaid to be maliciouſly done. But the ſtatute being miſrecited, it was for that cauſe principally adjudged, that the plaintiff *take nothing by his bill. Cro. Eliz.* 236. *pl.* 1.

An action on this ſtatute was brought in the *C. P.* but this was held by the whole court not to be within the ſtatute; and therefore judgment was given for the defendant. *Lutw.* 166, 169.

In an action on the *caſe* on this ſtatute, for proſecuting a ſuit againſt the now plaintiff, in the name of the defendant and *J. S.* without the knowledge of *J. S.* and in which the now defendant was nonſuited. The jury found the proſecution malicious.

It was argued whether the action lay, but adjourned. 2 *Sid.* 262. *S. C.* cited *Raym.* 135. by *Twiſden.* J. (who was counſel for the plaintiff in the ſaid cauſe) as reſolved that the action lies for ſuch indictment, but that the judgment was afterwards reverſed in the *Exchequer* chamber, but ſaid it ſeemed a hard caſe, if the action ſhould not lie. *S. C.* cited by *Holt Chief Juſtice*, in delivering the opinion of the court, 5 *Mod.* 409. and ſays, it is true that the judgment was reverſed, but that it was not becauſe the action would not lie, but becauſe he was not indicted of any offence within the ſtatute, as appeared upon the fact, as ſet forth in the indictment. So that if he had

had been convicted, he would have incurred no damage, for the court would have arreſted judgment.

*S. C.* cited by *Holt Chief Juſtice*, as from a manuſcript report of *Bridgman Chief Juſtice*, which ſays, the reaſon of the reverſal was, becauſe the indictment was for no offence at all: for, in fact, *Preſcott* arreſted *Chamberlane* in his own name, and the name of *J. S.* for a debt due to them jointly, which was lawful, without the conſent of *J. S.* And if *J. S.* did not appear, if it were in a perſonal action, he might be nonſuited; or if in a real action, he might be ſummoned and ſevered: and therefore it was held to be no offence.

*Lord Raym. Rep. S. C.* cited thus, *viz. A.* was indebted to *B.* and *C.* and *B.* without the knowledge of *C.* takes out proceſs in both their names againſt *A.* who afterwards proſecuted *B.* on the ſtatute for ſo doing, but *B.* was acquitted, and then he brought an action on the caſe againſt *B.* for this malicious proſecution; but adjudged that it would not lie, becauſe he might have demurred to the action on the ſtatute, for the caſe was not within the ſtatute; and ſo it was his own fault that he was put to charges by the trial. *Carth.* 417. *S. C.* cited by *Parker Chief Juſtice*, in delivering the opinion of the court.

10 *Mod.* 217. *Hil.* 12 *Ann.* takes notice that the *Lord Chief Juſtice Holt*, in his excellent argument on the caſe of *Savil* againſt *Roberts*, *Salk* 15. (ſee 10 *Mod.* 148, 214. *Gilb. caſ.* 179, 185. *Sir William Jones* 93.) where he gives the reſolution of the court, ſeems unwilling to deny this caſe to be law, though he might.

A defendant *ſuperſeded* by ſurpriſe without the plaintiff's knowledge, may be arreſted again for the ſame debt. *Barnes's notes*, 50.

No bail in action of debt on a judgment againſt a priſoner diſcharged by *ſuperſedeas* for want of proſecution. *Rule 2 of Hilary term*, 8 *Geo.* 2. 1734. *C. P. Mod.* 25. *pl.* 68. 2 *Keb. Rep.* 582. *pl.* 116. *March* 157. *pl.* 227. 2 *Stra.* 1039 See *id.* 1218.

On a motion in this caſe, *Holt Chief Juſtice* ſaid, that he had known it held by the court, that where the plaintiff was *nonſuited* for want of a declaration, and afterwards brought another action for the ſame cauſe, that he ſhould have but common bail to the ſaid action. *Lord Raym.* 679. See *Com. Rep.* 94. *ca.* 62. But this has not been abided by. 12. *Mod.* 501.

A plaintiff had been *non pros'd* in a former action for want of a declaration, and now, in a ſecond action, moved, that defendant might be diſcharged on common bail, alledging it to be the practice of

of *C. P.* *Per curiam*—We know of no ſuch practice here, and think it very unreaſonable; for the plaintiff ſuffers enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before. *Stra. vol.* 1. *p.* 439.

A plaintiff nonſuited in debt, on bond, may arreſt the defendant in a new action on the ſame bond. *Barnes notes* 69.

On a writ of error brought in the *Exchequer* chamber, on a judgment given in the *King's Bench*, the now defendant entered into a recognizance, purſuant to ſtatute 3 *Jam. chap.* 8. (made perpetual by 3 *Char. chap.* 4. *ſect.* 4) that the plaintiff in error ſhould proſecute his writ, and if the judgment ſhould be affirmed; then to pay the debt, damages and coſts.

Afterwards the judgment was affirmed: the plaintiff brought an action of debt on this recognizance againſt the bail; and the queſtion was, *Whether they ſhould be diſcharged upon common bail?* And it was ſaid by their counſel, that they ought to be diſcharged, for 'tis againſt the practice of the court that bail ſhould be required of bail.

The reaſon laid down in the books of practice, why bail is not required of bail, is, becauſe there would be no end of bail. See *Rep. & Caſ. of Pract.* 18. *Pract. Reg. C. P.* 11.

It was never yet determined, that ſpecial bail is not requirable in an action of *debt* on a recognizance of bail; but the reaſon of the caſe ſeems to require it, becauſe the recognizance is directly for payment of money, *viz.* to pay the debt, if the judgment ſhould be affirmed; and certainly it was never yet denied, that where an action of *debt* is brought on a bond for payment of money, but that ſpecial bail is always required: and the reaſon is the ſame for ſpecial bail in an action of *debt* on a recognizance againſt the bail, for ſuch recognizance is a ſecurity for the payment of the condemnation money, and a collateral undertaking that it ſhall be paid on the affirmance of the judgment; and the bail on the recognizance cannot be diſcharged but on payment of the money, for they cannot render the principal, becauſe ſuch render does not lie by the bail on a writ; and ſo it was held by two judges, the court not being full. 8 *Mod.* 237.

If an *habeas corpus* be returned into any of the courts above, though the ſum be under 10 *l.* they will hold the defendant to bail, 2 *Show. Rep.* 182. *pl.* 183. that ſo plaintiff may not be in a worſe condition than he was below, where defendant was held to bail.

The reaſon why defendants in all caſes are obliged to put in bail is, that their juriſdictions being confined, they cannot follow the

debtor out of their juriſdiction; therefore they have always (in the leaſt pledges) put in bail that live within their own precincts: and, were it otherwiſe, it would be improper to give caution, and therefore it becomes here neceſſary that bail ſhould be given in all caſes. *Gilb. Hiſt. C. P.* 37. *Rule of Mich. term* 1654. *Sect.* 12 *of Mich. term* 1649. 1 *Char.* 2. 6 *Mod.* 242. *Caſes in the time of Holt Chief Juſtice* 87. 12 *Mod.* 646.

In caſe of an executor, or adminiſtrator, or heir, no bail is required, even on an *habeas corpus*, for they ought not to have been held to bail below, the debt not being their own. 6 *Mod.* 242.

An action was brought in the court of the ſheriffs of *London*: the defendant brought an *habeas corpus cum cauſa*, and removed the cauſe into the *Common Pleas*; but not having put in bail, the plaintiff ſued out a *procedendo*. On motion to ſet aſide the *procedendo*, becauſe there was no judge's order for the defendant to put in bail.

The queſtion was, *Whether defendant ſhould not, at his own peril, put in bail? Or, whether plaintiff ſhould not procure a judge's order, and ſerve it upon defendant, that unleſs bail be put in, procedendo ſhould be awarded? Adjudged by the whole court*, that ſuch an order was neceſſary, and therefore the *procedendo* was ſet aſide. *Pract. Reg. C. P.* 52.

An action was brought againſt the defendant for a ſhip and cargo, and the queſtion was, *Whether defendant ſhould be diſcharged on common bail?* The cauſe came in from *London* by *habeas corpus*, and therefore it was inſiſted, that ſpecial bail ſhould be put in of courſe.

*Holt Chief Juſtice* held, they might examine into the cauſe of action, how it came thither by *habeas corpus*, and if it was ſuch which required bail, though under 10 *l.* they might make the defendant put in ſpecial bail; but if the action was vexatious, or ſuch as required no bail, then they would diſcharge him on common bail. See 2 *Show. Rep.* 182. *pl.* 183.

It was urged for the defendant, that what he did in relation to the ſhip and cargo, was as judge of the *Admiralty* in the *Weſt-Indies*, and therefore no reaſon why he ſhould be held to bail: but it appearing that defendant had the ſhip and cargo in his own cuſtody, which was intermeddling further than his office warranted; for this reaſon he was held to bail. *Salk.* 101. *Caſes in the time of Holt Chief Juſtice* 88, 89.

That before any allowance of any writ of error, on reverſing of any outlawry be had, by plea or otherwiſe, through or for want of any proclamation to be had or made, according to the form of ſtat. 31 *El.*

31 *El. chap.* 3. *ſect.* 3. the defendant and defendants in the original action ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit, in a new action to be commenced by the ſaid plaintiff for the cauſe mentioned in the firſt action, but alſo the condemnation, if the plaintiff ſhall begin his ſuit before the end of two terms next after the writ of error, or otherwiſe avoiding of the ſaid outlawry. *Rule of Mich.* 12 *Geo.* 1725. *C. P.* See *Hil.* 15 & 16 *Char.* 2. 1663. *Trin.* 2 *Jam.* 2, 1686. See 10 *Mod.* 281.

A plaintiff declared in an action of *debt* on bond; the defendant craved *oyer*, and the condition appeared to be for performance of covenants. The defendant, after *oyer*, inſtead of pleading, enters *nil dicit*, in order that *oyer* of the condition appearing on record, he might bring a writ of error without bail. The court, on hearing counſel on both ſides, ſet aſide this entry, and gave the plaintiff leave to enter judgment by default. And the queſtion now was, *Whether the condition of the bond, not appearing on record, bail ought to be required on the writ of error or not?* And the court held, that the matter of bail is properly examinable by *affidavit*; and the bond being conditioned for performance of covenants, bail ought not to be required on the writ of error. *Barnes notes* 67.

On a judgment in *C. B.* in *debt* on a bond, with condition to pay 500*l.* with intereſt at 5*l. an hundred*, being the ſame ſum as is mentioned in a *defeazance*, bearing date the ſame day with the bond. Error brought, bail muſt be put in on this writ of error, purſuant to ſtat. 3 *Jam. chap.* 8. (revived and made perpetual by 3 *Char. c.* 4. *ſect.* 4.) 2 *Stra.* 959. Caſes in the time of Lord *Raym.* & *Hardw.* Chief Juſtices, 181. *pl.* 147. 2 *Barnard. K. B.* 389 See *Show. Rep.* 14. *Comb.* 105.

In debt on a bond, conditioned that defendant ſhould pay to plaintiff for all ſuch beer as he ſhould deliver to one *Stokes*, not exceeding 100*l.* Plea, No beer delivered. Replication, Beer delivered to the value of 80*l.* Demurrer, judgment for plaintiff. Error brought. *By the court*, Bail is not neceſſary on this writ of error; the words of the ſtatute muſt be intended of a ſum certain, even at the time the action was brought. It was inſiſted, that the ſum was aſcertained by the pleadings, *but not allowed. Deniſon Juſtice* ſeemed to doubt of the caſe. *Suppl. to Lil. Abr.* 19 *pl.* 6. See *Lev.* 117. *Keb.* 613, 690. *Yelv.* 227.

On a writ of error on a judgment in *ejectment*. The recognizance of the plaintiff in error was of *two years* value of the land, but the court would not make him juſtify. Stat. 16 & 17 *Char.* 2. *c.* 8. (revived and made perpetual by 22 & 23 *Char.* 2. *c.* 4.) *Barnard. K. B.* 83.

The bond was for the ſafe return of ſuch a ſhip, (ſuppoſe under 100 *l.* penalty) and judgment thereon in the *Common Pleas*, and writ of error here; and the queſtion was, *Whether there ſhould be bail within the ſtatute?* And, *by the court*, Let there be bail, *unleſs cauſe*. 6 *Mod.* 38.

When a writ of error is brought on a judgment had on a bond to pay money (only), there ſpecial bail ought to be given; and after a year, a *ſcire facias* ought to precede the *Levari*, or *fieri facias*, by ſtat. 3 *Jam. chap.* 8. 11 *Mod.* 2.

On a motion that the plaintiff in error might put in ſpecial bail. This was an action on the caſe on a bottomree bond, to pay money on a contingency, the condition of which was, that if the ſhip or veſſel called *Qley Frigat*, &c. ſhall with all ſpeed ſail from the river of *Thames* to *China*, &c. without deviation, and return to the river within *thirty-ſix* kalendar months, hazard of the ſea excepted; and if *J. S.* ſhall, within the ſaid *thirty-ſix* kalendar months, or *thirty days* after the arrival of the ſaid ſhip, pay, &c. then the obligation to be void.

*Holt Chief Juſtice* ſaid, This is not a bond only for the payment of money, for if he does not go the voyage, he forfeits the penalty; for his going the voyage, return, and payment of the money, are all conditions: and inclined, that it did not require ſpecial bail. 11 *Mod.* 260.

A judgment in *ejectment* on a ſpecial verdict for the defendant. Error brought by plaintiff. Agreed *by the whole court*, No bail requirable on this writ of error. *Pract. Reg. C. P.* 178, 179.

On error brought by an heir at law, on a general judgment by *Nil dicit*. Agreed he ſhall have bail. *Barnes* 71.

In *ejectment*, a verdict for the plaintiff, writ of error brought, and bail put in. Motion that bail might juſtify. Defendant in error objected, that by the ſtatute 16 & 17 *Char.* 2. *c.* 8. *ſect* 3. (revived and made perpetual by 22 & 23 *Char.* 2. *c.* 4.) it was required that plaintiff in error ſhould himſelf enter into the recognizance in caſes of ejectment and dower. *Eyre* urged, that two perſons becoming bail, gave judgment in error a better ſecurity than he could have had in caſe plaintiff in error had alone entered into the recognizance. Clerk of the errors ſaid, the practice was both ways.

*Per curiam*—Let the bail juſtify, and if the plaintiff in the *ejectment* thinks the writ of error is not a *ſuperſedeas* becauſe the plaintiff in error has not entered into the recognizance, let him proceed at his peril. *Barnes* 71.

On

On a writ of error in the *Exchequer* chamber on a judgment given in *K. B.* and there the judgment was affirmed. Afterwards a writ of error was brought in the houſe of peers, and plaintiff in the original action being about to take out execution againſt the defendant, for entering bail according to the ſtatute 3 *Jam. c.* 8. by which it is enacted, That no execution ſhall be ſtayed on any writ of error, or *ſuperſedeas*, for reverſing a judgment in an action of debt or contract, unleſs the plaintiff in error ſhall firſt be bound with two ſufficient ſecurities, (ſuch as the court ſhall approve) to the party for whom the judgment was given by recognizance in the ſame court, in double the ſame. *Adjudged* to proſecute his writ of error with effect, and that if the judgment is affirmed, then to pay all debts, damages, and coſts ſo adjudged, and all coſts and damages for delaying the execution by the writ of error, *&c.*

Now the defendant having already entered into ſuch recognizance in *K. B.* before the writ of error was allowed, it was inſiſted for him, that he is not obliged by this ſtatute to give a new recognizance of bail, having already purſued the ſtatute, by giving bail in that court where the judgment was given, and it would be very hard for him to be bound in two recognizances for one and the ſame matter.

On the other ſide it was inſiſted, that this matter is ſo plain, that it was never controverted; for, on a writ of error in parliament, the plaintiff in error muſt alledge the judgment in the *K. B.* to be erroneous, as the judgment in the *Exchequer* chamber; and this writ is brought in delay of execution of the judgment: but the firſt recognizance does not extend to the coſts ſuſtained in the houſe of peers, but only to the coſts for delaying the execution by the firſt writ of error; ſo that if a new recognizance ſhould not be given, the coſts on the writ of error in parliament, if the judgment ſhould be affirmed, would be loſt.

The ſtatute enacts, that bail ſhould be given in the ſame court where the judgment was given; but this is only explanatory, and intended that it ſhould be given where the judgment was of record.

The intent of this ſtatute is, that the party ſhall not loſe his damages and coſts for delaying execution of judgment by a writ of error; now the judgment given in the *Exchequer* chamber in affirmance of the judgment in *K. B.* remands the record back again into that court; and if ſo, then there is no record of the judgment given in the *Exchequer* chamber, and therefore the writ of error in the parliament is directed to the Chief Juſtice of the *K. B.* where the record remains, and the judgment muſt be deemed as a judgment of that court, as to the writ of error, and all incidents thereof, ſuch as putting in bail, *&c.*

And

And there is no manner of inconveniency by entering into two recognizances, for both are the ſame, in reſpect to the plaintiff in error, becauſe by the ſtatute he has a proper remedy, if the plaintiff in the original action take out execution for more than is due; but it would be very inconvenient for him to be delayed by a writ of error, and to have no ſufficient ſecurity to make ſatisfaction for the loſs.

There is a caſe in *Hob.* 247. where an executor was obliged to give bail in the chamberlain of *London*'s court, and likewiſe bail for the ſame thing in the ſpiritual court, and ſo double bail; and this was warranted only by a particular cuſtom in *London*, which is not to be favoured ſo much as a general ſtatute for the advancement of juſtice: ſo the party was ruled to put in new bail in the *K. B.* 8 *Mod.* 79. *Salk.* 97.

A warrant made to three, jointly and ſeparately, this being a warrant for the execution of juſtice, may be ſufficiently executed by two. 2 *Rol. Rep.* 137.

So a ſheriff makes a warrant to four, *& cuilibet eorum, quod ipſi caperent:* two of the four take him, 'tis good. *Yelv.* 25.

For warrants of this kind are not to be reſembled to warrants of authority to make or take livery.

A warrant to two men jointly to arreſt another, either of them may do it. *Co. Lit.* 181. *Cro. El.* 913.

By ſtat. 2. *Geo.* 2. *c.* 23. *ſ.* 22. made perpetual by 30 *Geo.* 2. *c.* 19. *ſect.* 75. "Every proceſs for arreſting, and every writ of execution, or ſome label annexed, and every warrant upon ſuch proceſs, ſhall, before ſervice or execution, be ſubſcribed or indorſed with the name of the attorney, clerk in court, or ſolicitor, by whom ſuch proceſs, *&c.* ſhall be ſued forth; and where ſuch attorney, *&c* ſhall not be the perſon immediately employed, then alſo with the name of the attorney ſo immediately employed: and every copy of any writ ſerved upon any defendant ſhall before ſervice be ſubſcribed with the name of the attorney immediately employed."

A rule to ſhew cauſe why proceedings ſhould not be ſtaid, diſcharged with coſts. The objection was, that no attorney's name was ſet to the ſheriff's warrant, as required by act of parliament; but, by the court, a warrant is not void, the act of parliament is directory only: the ſheriff is blameable, but the party muſt not ſuffer for his default. *Barnes* 203. *Pract. Reg. C. P.* 441. 2 *Barnes* 327. *Pract. Reg. C. P.* 442.

By

By ſtat. 12 *Geo.* 2. *c.* 13. *ſect.* 4. "The not ſubſcribing or indorſing the name of the attorney, clerk in court, or ſolicitor, on any warrant made upon any writ, proceſs, or execution, ſhall not vitiate the ſame; but ſuch writ, proceſs, and execution, and all proceedings thereon, ſhall be valid and effectual, provided the writ whereon ſuch warrant is made out be regularly ſubſcribed or indorſed; and every ſheriff or other officer who ſhall make out any warrant upon a writ, proceſs, or execution, and ſhall not ſubſcribe or indorſe the name of the attorney, clerk in court, or ſolicitor, who ſued out the ſame, ſhall forfeit the ſum of 5 *l.* to be aſſeſſed as a fine by the court out of which ſuch writ, proceſs, or execution ſhall iſſue; one moiety to be paid to his Majeſty, and the other moiety to the perſon aggrieved."

By ſtat. 6 *Geo. c.* 21. *ſect.* 53. and 43 *El. c.* 6. *ſect.* 1. "No high ſheriff, under ſheriff, their deputies or agents, ſhall make out any warrants before they have in their cuſtody the writs upon which ſuch warrant ought to iſſue, on forfeiture of 10 *l.*"

*Per Holt* C. J. The ſheriff ought not to make a blank warrant for the attorney to fill up with a ſpecial bailiff. 12 *Mod.* 527.

The warrant under the hand of the ſheriff to the bailiff is good evidence, *&c.* It is not ſhewn, that the plaintiff was proſecuted or arreſted at the ſuit of the defendant; and perhaps the defendant was only the bailiff, and then the action will not lie againſt him. *Raym.* 504.

"Every warrant to be made out upon any writ out of the *King's Bench*, *Common Pleas*, or *Exchequer*, before judgment, to arreſt any perſon, ſhall have the ſame day and year ſet down thereon as ſhall be ſet down on the writ itſelf, under the forfeiture of 10 *l.* to be paid by the perſon who ſhall fill up or deliver out ſuch warrant; both penalties to be recovered and divided as the other penalties in *ſtat.* 9 *W.* 3. *c.* 25. *ibid. ſect.* 54.

On rule to ſhew cauſe why an information ſhould not go againſt a man, the chief complaint that remained unanſwered was, that he executed a *blank* warrant; and it was ſaid, this was ruled to be bad very lately at the aſſizes at *Carliſle*. But *Page* Juſtice ſaid, that on an indictment for murder, a juſtification was made by a *blank* warrant before Mr. Juſtice *Powel*, and he allowed it to be good. He believed too, that in theſe large counties, as this was in *Yorkſhire*, the practice of making out *blank* warrants is very frequent: however, the court in general ſaid, that there was no occaſion to determine the legality of this matter now. The preſent motion was for an information, and they did not think this a ſufficient reaſon for granting it. There is another remedy for the party, if he thinks proper to try whether

theſe

theſe warrants are legal or not. Accordingly the rule was diſcharged. 2 *Barnard. Rep. K. B.* 198.

In treſpaſs for plaintiff's houſe and falſe impriſonment, the defendant pleaded, that a *capias ad reſpondendum* was ſued out againſt the plaintiff, and a warrant made out to the defendant, as a bailiff; thereupon he came to plaintiff's houſe, and found the outward door open, and on that he entered, and came to an inward door of a chamber, wherein the plaintiff was, which inward door was ſhut; on which he requeſted the plaintiff to open the door; but on his refuſing to do it, he broke it open, and arreſted the plaintiff by virtue of the ſame warrant. In evidence to ſupport this plea, the defendant produced this warrant; but his attorney owned that it was a *blank* one, and he filled it up: but notwithſtanding this, the judge was of opinion, that the warrant was legal; and in a caſe of an indictment of murder, tried before Mr. Baron *Lovel*, he obſerved that the Judges were of the ſame opinion. The defendant then went on to prove the other part of his juſtification, but becauſe he failed in proving the requeſt, the judge directed a verdict to be for plaintiff. 2 *Barnard. K. B.* 407.

If the ſheriff has a good writ againſt a man, and he makes an ill warrant to his bailiffs on it to arreſt the man, and they arreſt him accordingly, though bailiffs cannot, yet the ſheriff may juſtify by virtue of the writ; for if the ſheriff be in any manner privy to the taking, as if he commanded his bailiffs to arreſt a man by parol, when he is taken accordingly, he is in cuſtody of the ſheriff; and if he has a writ againſt him at the ſame time, he is arreſted and is in cuſtody by virtue of the writ; indeed ſheriff muſt be privy to the taking, or otherwiſe he cannot be in cuſtody. The King v. *Fowler. Raym.* 586.

A ſheriff, on a bill of *Middleſex*, makes a precept to the bailiff of *Weſtminſter*, to arreſt *J. F.* knight, *when in truth* he was not knight, but baronet only. This was not a good warrant, and the deputy bailiff being killed by Sir *John*'s ſervant, it was not found murder in the ſervant, becauſe the bailiff's warrant was not good, and upon trial the ſervant was acquitted. *Jo.* 346. *pl.* 5. *Cro. Car.* 372. *pl.* 6. *Hawk. pl. Cr. c.* 31. *ſect.* 37. *p.* 86. See *Stra.* 156.

If a ſheriff's bailiff comes to execute proceſs, but has not a lawful warrant, as if in name of the bailiff, plaintiff or defendant be interlined, or inſerted after ſealing thereof, by the bailiff himſelf, or any other, if ſuch bailiff be killed, it is but manſlaughter, and not murder. *Hal. Hiſt. Pl. Cr.* 457.

So held in the caſe of *J. S.* who was tried for the murder of Mr. *E. E.* at *Cheſter Lent* aſſizes 1759. *Cro. Car.* 538, 539.

If

If officer arrests a party before he has a warrant, and afterwards procures one, yet the first arrest is wrongful. *Dalt. Sher. c.* 22. *p.* 111.

A sheriff's bailiff cannot execute a writ directed to the sheriff, without the sheriff's warrant.

If the writ comes out of the *King's Bench*, then the warrant must be, *So that I may have his body before the Lord the King*, &c.

If out of the *Common Pleas*, then it must be, *So that I may have his body before the Justices of the Lord the King*, &c.

If three writs of *capias* on process at the suit of *J. S.* against *J. D.* are directed to the sheriff, and the sheriff makes three special warrants to one special bailiff, and he comes to *J. D.* and arrests him generally, without shewing him in what action, neither is it demanded of him, but presently on the arrest a stranger rescues him; an action on the case lies against the stranger for all the three, for this was an arrest in law on all. 17 *Vin. Abr.* 538. *pl.* 1. 541. *pl.* 4. *Cro. Jac.* 485, 486.

So, if the writs and warrants were at the suit of three several persons, and the bailiff arrests him generally, as before; for as this is a good arrest for all, all shall have actions for the rescue.

He is not bound to shew his warrant at first, or to shew at whose suit it is, before the party has peaceably submitted to the arrest. *Cro. Jac.* 485, 486.

In the Countess of *Rutland*'s case it was held, that when the sheriff, or other person by his authority, arrests another, he ought on the arrest to shew at whose suit, out of what court, for what cause, and when the process is returnable; to the intent that if it be on execution, he may pay it and free his body, or agree with the party, or put in bail according to law, and to know when he shall appear. This is meant after a peaceable submission. *Cro. Jac.* 485, 486. which is a leading case in point. But when the party makes resistance, or flies, he need not make such declaration. *Dalt.* 110.

The bailiff who had two warrants against one at the suit of *J. S.* laid his hands on him, and having both the warrants in his pocket, he said, I arrest you by force of a warrant I have; but did not shew it him, nor had it in his hands, nor told him at whose suit. *Cro. Jac.* 485, 486.

The court reſolved,

1. This arreſt, without ſhewing the warrant, and telling at whoſe ſuit, till the other demanded, is legal.

2. This arreſt, without having the warrant in his hand, and having both warrants about him, is well enough, though he did not ſhew by which of the warrants he arreſted him; for he being under the bailiff's arreſt, is in cuſtody there for all cauſes for which the ſheriff had made his warrant againſt him, though the ſheriff or bailiff do not mention any ſpecially.

*Roll* C. J. in another caſe, made this diſtinction; A ſpecial bailiff is bound to ſhew his warrant to the party whom he is to arreſt, otherwiſe the party arreſted is not tied to obey him; but he is not *bound to ſhew his warrant to a ſtranger.*

But a known bailiff, *i. e.* one that is commonly known, is not bound to ſhew his warrant to any.

A ſworn and known officer (be he ſheriff, underſheriff, bailiff, or, ſerjeant) need not ſhew his warrant; yet, on the arreſt, the officer ought to declare the contents of the warrant.

If an officer arreſt a man before he has a warrant, and afterwards procures a warrant, yet the firſt arreſt was unlawful. *Dalt.* 111.

The ſame if the officer makes a warrant for ſummons or arreſt, not having the original writ or proceſs warranting the ſame; if it appear to the judges, they ſhall commit the offender to the gaol till he has paid 10 *l.* to the party aggrieved, and 10 *l.* to the King. But a *capias* without an original is a ſufficient warrant to the ſheriff. 43 *El. c.* 6. *Dalt.* 111, 112.

## *Adjudications for oppoſing the Execution of the Law.*

AN action on the *caſe* will lie againſt him that ſhall hinder, diſturb or prejudice, one that has the franchiſe or liberty of the execution and return of writs and proceſs, in an hundred or other place. *F. N. B.* 95. *Reg. Orig.* 103, 104.

The like, if a man be diſturbed in taking the profits of his office. *Popb.* 141.

It will lie againſt him who ſhall diſturb an officer in the execution of his office, as in the attaching and diſtraining of goods; and it will lie either for the officer or plaintiff in the ſuit. *F. N. B.* 102.

If a perſon hinders an officer in doing of execution in his office at my ſuit; as where the ſheriff ſhall come to another man's houſe, where the goods of the defendant are, and the door of the houſe being open, another man, not the owner of the houſe, does ſhut the door and keep him out; or the owner of the houſe, or another man, ſhall convey away the goods and prevent execution, the party injured may have an action againſt him.

If in the perſon's own houſe, or to prevent execution of his own goods, no action will lie. 5 *Co.* 91.

If I have an execution againſt the goods of *J. S.* and he has goods in the houſe of *K. L.* and the ſheriff comes to the houſe, and tells *K. L.* who he is, and wherefore he comes, and deſires him to open the doors to him, and he keeps him out that he cannot do execution, I may have this action againſt *K. L.* 5 *Co.* 93.

If an officer be coming to arreſt a man, or attach his goods at my ſuit, and another man conveys away the goods or the perſon, ſo that the officer cannot do his work, I may have this action. *F. N. B.* 102. 21 *H.* 7. 40. 18 *Ed.* 3. 3.

*It was held*, that on a *ca. ſa.* the ſheriff may not break open a man's houſe to make execution, but he is puniſhable for it; but on a *capias utlagatum* he may enter any man's houſe to apperehend him, for no place ought to protect him againſt the King: but whether he might on *fieri facias*, or *extendi facias*, break the houſe of any perſon to make execution, was doubted; but no doubt, if the doors were open, he might enter, for the law gives him authority thereto; as an executor may enter to take goods left there by the teſtator. *Cro. Eliz.* 908.

An action was brought againſt the defendant for ſhutting his door and hindering the ſheriff to ſeize the goods of *G. B.* in his houſe. *F.* and *Y.* Juſtices, were of opinion, that the goods being in the defendant's houſe, who is a ſtranger to the execution, he is not bound to take cognizance of the ſheriff's intent in coming to make execution; and the ſhutting the door was lawful, although there was loſs to the plaintiff.

It did not appear in this caſe, how the goods of the cognizors, which were in the defendant's houſe came thither; and if they were taken by the defendant as a treſpaſſer, the party whoſe goods they

are, or the ſheriff upon execution, may come within the houſe if the door be open, to ſeize them, becauſe the defendant had them by unlawful means.

If the defendant had taken them by lawful means, *viz.* by bailment or otherwiſe, neither the party himſelf, nor the ſheriff, can come within the houſe to ſeize them; and therefore the ſhutting the door was no cauſe of action for the plaintiff.

It was agreed, on the whole argument, that the ſheriff might not break any man's houſe to make execution, unleſs in the caſe of the King, or for a contempt. And thereupon judgment was given for the defendant.

An officer cannot juſtify breaking open an outward door or window, in order to execute proceſs in a civil ſuit, if he does, he is a treſpaſſer; but if he finds the outward door open, and enters that way, or if the door be opened from within, and he enters, he may break open inward doors, if he finds *that* neceſſary, in order to execute his proceſs. *Foſter's Crown Law* 319.

It is held by the books, that a man's houſe is his caſtle, for ſafety and repoſe to himſelf and family; and conſequently the officer in the caſe I have put, being a treſpaſſer, cannot be ſaid to be acting in the diſcharge of his duty, at the time and in the very inſtance in which he is committing a treſpaſs; theſe ſuppoſitions are inconſiſtent, and deſtroy each other; but if he finds the door open, or gains admiſſion from within, he having a lawful call to the place, as he certainly has, cannot be a treſpaſſer in entering the houſe, and conſequently may remove any obſtruction he meets with in proſecuting the buſineſs he came about. *Ibid.*

This *maxim*, that every man's houſe is his caſtle, when applied to the caſe of arreſts on legal proceſs, has been carried as far as the true principles of political juſtice will warrant; perhaps beyond what in the ſcale of ſound reaſon and good policy they will warrant: but in caſes of life we muſt adhere to rules well known, and long eſtabliſhed. *Ibid.*

This rule is not one of thoſe that will admit of any extenſion, it muſt therefore, as I have before hinted, be confined to the breach of windows and outward doors intended for the ſecurity of the houſe, againſt perſons from without endeavouring to break in. *Ibid.*

It muſt likewiſe be confined to a breach of the houſe in order to arreſt the occupier or any of his family who have their ordinary reſidence there. If a ſtranger, whoſe ordinary reſidence is elſewhere, on a purſuit takes refuge in the houſe of another, this is not *his* caſtle, he cannot claim the benefit of ſanctuary in it.

This

This rule is likewiſe confined to the caſe of arreſts *in the firſt inſtance*. For if a man be legally arreſted, (and laying hold of the priſoner, and pronouncing the words of arreſt, is an actual arreſt, *Salk.* 79. *Ventr.* 306. 6 *Mod.* 173. 7 *Mod.* 8. 2 *Ld. Raym.* 1028.) and eſcapes from the officer and takes ſhelter, though in his own houſe, the officer may on freſh ſuit break open doors in order to retake him; having firſt given due notice of his buſineſs, and demanded admiſſion, and been refuſed. *Ibid.*

This doctrine holds in every caſe when doors may be broken open in order to arreſt; whether in caſes criminal or civil, there muſt be ſuch notification, demand, and refuſal, before the parties concerned proceed to that extremity.

The rule already mentioned, muſt likewiſe be confined to the caſe of arreſts on proceſs in *civil* ſuits. *Foſt. Cro. Law.* 319, *&c.*

## Bail.

### *What it is.*

BAIL is ſo called, becauſe the party bailed is delivered by law into the cuſtody of thoſe that are his bail, and who are to anſwer the plaint if they do not produce the principal to do it. *Compl. Sher.* 108.

A perſon in execution, in cuſtody of the *marſhal* of the *King's Bench*, is not compellable to find bail if another action be brought againſt him; but if he be in the *Fleet* on execution, and an action be brought againſt him in the *King's Bench*, he muſt either be removed and committed to the cuſtody of the marſhal, or elſe he muſt put in bail to the action. *Ibid.*

### *Who are authoriſed to take Bail in* London.

IT is the common courſe of *London*, on plaint before the ſheriffs, and a precept to the ſerjeant to arreſt one, the ſureties ſhall be found and offered to the ſheriffs, not to the ſerjeants. The ſame practice is purſued in inferior *mayors* courts. *Ibid.*

In falſe impriſonment, the defendant pleads the *cuſtom* of *London*, that on entry of plaint in *London*, a ſerjeant may, by *parol* or otherwiſe, arreſt the defendant to anſwer the plaintiff; and ſhews, that *J. S.* entered

entered a plaint in the *Compter* againſt the now plaintiff, and that he was a ſerjeant, and arreſted him and carried him to the *Compter* till he found ſufficient bail. The plaintiff confeſſed the cuſtom, the entry of the plaint and arreſt, and that he offered ſecurity to the ſheriff; and of this he gave notice to the defendant, and yet he carried him to the *Compter*. The defendant demurs.

*Per curiam*—The ſerjeant, on tender of bail to the ſheriff, is not bound to ſet the party at large, unleſs the ſheriff ſend a warrant teſtifying this to him. *Cro. Car.* 196. *Rol. Abr.* 561. *T. Jo.* 226.

The like point was agreed, where an arreſt was on a plaint in the court of *N*———, and the defendant in gaol, under cuſtody of the mayor, and not of the ſerjeant. *Cro. El.* 77.

In all corporation courts, the mayor who is judge, is gaoler alſo; that bail being a matter of record, cannot be found before any but the judge of the court, and not before the ſerjeant; though alledged *according to the cuſtom of the vill.* But bail for appearance only, may be taken by the ſerjeant. *Cro. Jac.* 94, 95. *Cro. El.* 168.

If a *capias* for good behaviour be directed to the ſheriff by the juſtices of *aſſize*, and on this the ſheriff makes a warrant to *J. S.* to take him, who took him accordingly, and the party tenders *J. S.* ſufficient bail for his appearance; and *J. S.* refuſes it, and keeps him in cuſtody: this makes him not a treſpaſſer *from the beginning*; for it is not his office to take bail, but the ſheriff's. 2 *Rol. Abr.* 562.

Neither the ſheriff, nor any juſtice of the peace, can bail one taken by a writ of *cap' excommunicat'*, but he is bailable by the *King's Bench. Bulſtr.* 122.

The *writ of capias* muſt be taken out, ſealed and delivered againſt the bail, before he can be taken by a *teſtatum capias* in another county; and becauſe it was never delivered to the ſheriff, but all returned in one term, the execution was ſet aſide. 2 *Keb. Rep.* 424. *pl.* 58.

The *writ of ſcire facias* againſt the bail, uſually is left *four days* with the ſheriff before the return of it; but if it be not, it is well enough. 2 *Keb. Rep.* 229. *pl.* 1. *Salk* 599. *Barnard. K. B.* 364.

On a judgment on a *ſcire facias* againſt manucaptors, the bail is liable by the judgment; and if they be freeholders in the ſame county where the recognizance is made, then they muſt have notice and time,

time, becauſe the *ſcire facias* may be returned: but if they be ſtrangers, the ſheriff is not bound to warn them, or give notice, but muſt return the *nihil* on both together; for this is but of favour to the bail, who at their peril ought to bring in the principal. *Compl. Sher.* 111.

In an action brought againſt *baron* and *feme*, and the huſband is only arreſted; yet the huſband muſt put in bail for his wife, if the name of the wife be in the writ, elſe he is not bound to put in bail for her; for it is the writ that warrants the bail. *Mod. Rep.* 8. *pl.* 25. *Rep. and Caſ. of Pract. C. P.* 117. *Barnes's Notes C. P.* 59. 2 *Barnes* 74, 80. 6 *Mod.* 17, 105. 7 *Mod.* 10, 63. *Lev. Rep.* 1, 216. *Salk.* 114. *pl.* 3, 115. *Sid.* 20, 395. *pl.* 2. *Keb. Rep.* 189. *pl.* 171. 189. *pl.* 194. *Freem. Rep.* 210. *pl.* 216. *Latch.* 224. *Styl.* 475. *Comb.* 355. 2 *Keb. Rep.* 442. *pl.* 4. See 10 *Mod.* 162. 2 *Str.* 1167, 1237, 1272. *Cro. Jac.* 445. *pl.* 23. *Cro. El.* 370. *pl.* 9. *Hut.* 86. *Cro. Car.* 58. *pl.* 2. *Lit. Rep.* 18. *Dy.* 271. *b. pl.* 27. 12 *Mod.* 444, 445. *Leon.* 138. *pl.* 189. *Bac. Abr.* 210. *Goldſb.* 127.

The huſband is not bound to put in ſpecial bail for his wife, if ſhe be not arreſted; but he muſt appear for himſelf and his wife, and muſt find ſpecial bail for himſelf. *Keb. Rep.* 241. *pl.* 82.

If bail is put in *de bene eſſe* (as at a judge's chamber) the plaintiff cannot ſue the ſheriff's bond till it be refuſed or ſet aſide; but he ought to except againſt the ſame in the judge's bail-book. *Keb. Rep.* 478. *pl.* 5. Exception muſt be within *twenty days* after notice of bail given. *Keb. Rep.* 690. *pl.* 3.

For directing how and to whom commiſſions may be granted to take bail in the country in any action or ſuits depending in the courts at *Weſtminſter*, and how ſuch bail ſhall be juſtified, ſee *ſtat.* 4 *W. & M. c.* 4.

By *ſtat.* 23 *Hen.* 6. *c.* 9. *ſect.* 1. "The ſheriffs and other officers and miniſters, ſhall let out of priſon all perſons in their cuſtody by force of any writ, bill, or warrant, in any action perſonal, or by cauſe of indictment of treſpaſs, upon reaſonable ſurety of perſons having ſufficient within the counties to keep their days, perſons in ward by redemption, execution, *capias utlagatam*, or *excommunicatum*, ſurety of the peace, and all perſons committed by ſpecial commandment of any juſtices excepted."

Note. *This ſtatute is frequently pleaded in our books; and many caſes about the nature of this ſtatute, and the returns and pleadings thereupon, we meet with, which if methodically digeſted, would be the better and more clearly explained.*

At

At *common law*, if the ſheriff had taken any man by the King's writ, he muſt not be delivered but by *writ de homine replegiando*; and he was not compellable to take bail of any. 2 *Saund.* 60.

The foregoing ſtatute compels him to take bail; and the deſign of this ſtatute is to provide againſt the extortion of ſheriffs, who would not deliver them without great ſums. *Cro. Eliz.* 808.

If a perſon was in execution, they would take ſuch bonds as they pleaſed, and let him at large. *Dalt.* 518. *Plowd. Com.* 67. *b.*

The ſtatute preſcribes the form, and that the ſheriff, under colour of his office, ſhould not oppreſs the party to make him any other obligation, for the ſtatute makes the obligation void for not purſuing the form, but not in the matter thereof. This ſtatute was made for the priſoner's benefit; for the miſchief before was, that the ſheriff not being compellable to bail him, would extort money to bail him. *Mod. Rep.* 228.

*This ſtatute has alſo three branches.* viz.

1. A commandment and authority to the ſheriff to let to bail ſuch perſons as are mainpernable: ſo it extends to *coroners, ſtewards, of franchiſes, bailiffs, keepers of priſons*, &c.

2. A reſtraining branch, that they ſhall not let to bail ſuch perſons as be in their ward by condemnation, execution, *capias utlagat'*, or *excommunication*, ſurety of the peace, and ſuch as ſhall be committed by ſpecial commandment of the juſtices, nor vagabonds.

3. The third is, to make obligations void, taken in any other form than the ſtatute limits, *That no ſheriff, nor any of his officers and miniſters aforeſaid, ſhall take or cauſe to be taken, or make any obligation for any cauſe aforeſaid, or by colour of their office, but only to themſelves, of any perſon, nor by any perſon which ſhall be in their ward, by the courſe of the law; but by the name of their office, and upon condition written, that the ſaid priſoners ſhall appear at the day contained in the ſaid writ, bill or warrant, and in ſuch places as the ſaid bill*, &c. *ſhall require: and any other obligation taken by them in any other form, ſhall be void.*

*In taking theſe bonds there are three forms to be obſerved.* viz.

1. That it ſhall be made to the ſheriff himſelf.

2. *Note*, theſe words *(for any other cauſe)* refer to all that was before, as well thoſe contained in the exception, as in the firſt branch. Therefore a bond taken of a man in execution, is void by this ſtatute, and the ſurety may plead, this was taken by him in execution

tion as ſheriff, and the words, *by colour of his office*, make it void; for he lets him to bail who is not mainpernable. *Plowd.* 69, 80.

3. *Note* alſo, *(nor any of his officers;)* it is not ſo, and the printed ſtatute is miſtaken. It is not the ſheriff, *(or any of his officers,)* but not any *des officers*, not *ejus officarti*, but *alii officiarii*; and ſo is old *Raſtal*, which is in *French*. *Compl. Sher.* 114.

In debt on bond to one *L.* the defendant pleaded it was for eaſe; it was held to extend to the marſhal, though he is not *de ſes officers*, but one *des officers* and miniſters of juſtice. 3 *Keb. Rep.* 71. *pl.* 14.

If the ſtatute be miſrecited, it may be demurred to, as it was in this very caſe. *Cro. El.* 108. *pl.* 4.

As to the three forms to be obſerved:

1. That it ſhall be made to the ſheriff himſelf.

2. That it ſhall be made to him by the name of his office.

3. That it ſhall be only for appearance at the day and place. *Cro. El.* 862. *pl.* 38. 2 *Ander.* 175. *pl.* 97. *Mo.* 636. *pl.* 875.

As to the inſufficiency of the ſureties, that is matter, and not form, and the obligation is not void.

The ſtatute preſcribes the form, and that the ſheriff, under colour of his office, ſhould not oppreſs the party to make him any other manner of obligation; for the ſtatute makes the obligation void for not purſuing the form, but not in the matter thereof: therefore the ſheriff may take one ſurety, or one that has no land in the county. *Cro. El.* 624, 672, 838, 852, 862. *Cro. Car.* 446. *Forteſc. Rep.* 369. *Mod. Rep.* 32. 10 *Co.* 100. *Cro. Jac.* 186. *Com. Dig.* 506. *Lil. Abr.* 233. but *Plowd.* 69. and *Barnes* 46.

## *What Bonds are not good.*

1. In reſpect to the perſons and officers to whom they are made.

2. In reſpect of the form.

1. In reſpect of the officers or perſons to whom made.

Bond given to a deputy of a *bailiff of a franciſe* is void, or to an *under-ſheriff's deputy*; it muſt be to the *bailiff* or *ſheriff* himſelf. *Noy* 69.

A ſerjeant at arms, attending on the preſident and council of the marches of *Wales*, is not an officer within this *ſtat.* *Cro. Car.* 309. *pl.* 10. *Style Rep.* 234.

If the bailiff of an *hundred*, which is a *franchiſe*, takes bond, he muſt do it in the ſheriff's name. 3 *Keb. Rep*, 71. *pl.* 14, 117. *pl.* 26, 125. *pl.* 42.

The bond muſt be taken to the ſheriff himſelf, and not to another. *Dy.* 199. 10 *Rep.* 109. *Plowd.* 68. *a. b.*

A ſerjeant of the houſe of commons is not within this ſtatute. *Keb. Rep.* 391. *pl.* 103.

This ſtatute does not extend to a bond made to the plaintiff himſelf. *Al.* 58.

The bond not being taken by the ſheriff in the name of his office, in debt on the bond, the defendant demurs upon *oyer*. *But not allowed*; for the ſtatute is not pleaded, and it may be for a juſt debt. 2 *Keb. Rep.* 620. *pl.* 11. *Cro. El.* 862. *pl.* 38. 2 *Rol. Rep.* 364. *Palm.* 371. *Saund.* 21. *R. Raym.* 357.

Marſhal and under-marſhal of the *King's Bench* is within this ſtatute, it is void. *Cro. Eliz.* 66. *pl.* 12.

A bond to *N.* ſheriff of *W.* and the bond was to *Neele, vic' com' præd'*; and *W.* put in the margin. *Dodridge* Juſtice, this is not a good bond, he ought to be named ſheriff, and of what county. 2 *Rol. Rep.* 365.

The houſe of commons had voted one *W.* guilty of high treaſon, and the plaintiff being a ſerjeant at arms, took the ſaid *W.* into cuſtody; and the defendant entered into bond to the plaintiff, conditioned for the ſaid *W.*'s appearance, who did not appear. An action of *debt* was brought thereon, and on demurrer, *per curiam*—It is a void bond by the *common law*, being entered into for eaſe and favour of the priſoner, and he was not bailable. But they held, the plaintiff was not an officer within *ſtat.* 23 *H.* 6. *c.* 10. The condition recites the bond was entered for appearance only, is an *eſtoppel*; for *eſtoppel* is when the bond is a good bond, then the recital is an *eſtoppel*; but when the bond is void, the *eſtoppel* is void too. *Hard.* 464. *T. Raym.* 62. *Keb. Rep.* 391. *pl.* 103.

On *oyer* of two ſeveral ſheriffs bonds, defendant demurs. And upon the argument it appeared, that they were jointly bound; and the plaintiff declared againſt the defendant ſingly, for which the defendant demurred; but it was anſwered, that it did not appear the other

other perſons had ſealed the bonds; and if not, then their bond was ſingle notwithſtanding; and if in truth they had ſealed, then the defendant ſhould have pleaded in abatement, and that they were living, &c. And the whole court was of the ſame opinion. And judgment was given for the plaintiff, unleſs cauſe, &c. 6 *Mod.* 122

On a bond to the ſheriff to *appear* and *anſwer*, &c. is void by ſtatute 23 *H. c.* 10. otherwiſe to appear to anſwer; for the party by the law may appear, yet judgment may be given by default. *Noy. Rep.* 54. *Hetl.* 117.

If a bond be given to the ſheriff for appearance, (before the writ was delivered) was allowed good. *Keb. Rep.* 554. *pl.* 66.

A bond taken by the ſheriff for an appearance at *Weſtminſter*, and the term was adjourned to *St. Alban's*, and the party appeared there; Held, he had not forfeited the obligation. *Mo.* 460. *pl.* 601. *Cro. El.* 466. *(bis) pl.* 16.

The bond ſhall alway relate to the day and place comprized, and he ought to appear at the *King's Bench*, or elſe he forfeits his bond. *Mo.* 496.

The condition of a bond was, if the ſaid *J. D.* perſonally appeared, &c. *from the day of* Eaſter *in* 15 *days*, to anſwer to *J. H.* as ſhall appertain, and farther to do and receive as the court therein ſhall conſider in that behalf, that then, &c. This was held to be a void bond. *Cro. Eliz.* 692. *pl.* 31.

If the ſheriff take a bond for the appearance of *J. S.* before proceſs comes to him to arreſt *J. S.* and after the proceſs comes, this bond is good. *Sid.* 151. *Keb. Rep.* 554.

Bail-bond was to appear at *Weſtminſter*, *on Saturday next after eight days of the Purification*, it was held ill; becauſe it was intended the feaſt day. 3 *Keb. Rep.* 266. *pl.* 5.

A bill of *Middleſex* was returnable *on Friday*, the condition of the bail-bond was, if the defendant appeared *on Saturday*; held to be a void bond. *Saund.* 21, 22.

On a condition to appear and anſwer is good enough. *Cro. Jac.* 286.

The condition of the bond was, that if the defendant do appear *in B. R.* ſuch a day, then the condition of the obligation to be void; *Per curiam*—Both are good. For if theſe words were omitted, it is

but *ſurpluſage*. *Sid.* 456. *pl* 27. 2 *Keb. Rep.* 625. *pl.* 24. *Mod. Rep.* 35. *pl.* 85. 2 *Danv. Abr.* 7, *pl.* 8. 25. *pl.* 5. 2 *Saund.* 78. *Ventr.* 39.

On condition to appear before his Majeſty's Juſtices of the *King's Bench* at *Weſtminſter*; the defendant pleads ſtatute 23 *H.* 6. and that this was in *another form*; it ſhould be *before our Lord the King, whereſoever*, &c. yet it was adjudged good. The ſtatute is not to be avoided by ſuch miſtakes of returns. 3 *Keb. Rep.* 551. *pl.* 59, 611. *pl.* 66. 627. *pl.* 15.

A condition was *ad reſpondend. E. exec'. in plac' trans' de* 100 *l. and the writ was ad reſpondend' E. in placito treſp. ac etiam billæ* 100 *l. de debito*, &c. This variance is not material; if the bond be made in the name of his office, and the condition expreſs the time and place of his appearance, and at whoſe ſuit, it is enough. *Cro. Jac.* 286. *pl.* 2. *T. Jo.* 137. *T. Raym.* 220. 3 *Keb. Rep.* 111. *pl.* 18, 164. *pl.* 40. 2 *Jo.* 46.

On a condition, if ſuch a one who is arreſted on a *latitat* appeared perſonally, and anſwered, &c. in regard his appearance is neceſſary to put in ſpecial bail, if the party requires it, the bond is good. *Cro. El.* 776. *pl.* 7. 10 *Rep.* 100.

A writ out of the *King's Bench* returnable out of term, the ſheriff takes the party, and takes bond to appear at the day of the return, and for non-appearance brought debt on this obligation; *held* that this bond was void by the ſtatute; and the ſheriff ſhall not be *amerced* for non-appearance, nor liable to any falſe impriſonment by the party. 2 *Sid.* 129. *Stra.* 399 *Forteſc. Rep.* 363. *R. Raym.* 353.

The writ is, *in a plea of treſpaſs*. The condition of the bond is to anſwer, *and alſo to a bill for* 100 *l. in a plea of debt*, is void, being another writ; but if the writ were, *in a plea of debt*, or the bond taken only to anſwer the writ *in a plea of treſpaſs*, it were well enough. And *that he take nothing by the bill* was awarded, on demurrer by the plaintiff on the defendant's plea on the ſtatute, it being *in another form*. 3 *Keb. Rep.* 164. *pl.* 40. *Ventr.* 243.

*In a plea of debt*, is good, without mentioning the ſum. The bond ought to be made to the ſheriff by the name of his office, and ought to expreſs the day and place of his appearance; and theſe circumſtances being obſerved, though it be variant in other circumſtances, it is not material. *Cro. Jac.* 286.

The ſheriff cannot take bond to appear at another day than is contained in the writ. 2 *Keb. Rep.* 526.

If an obligation be taken by the ſheriff after the day of the return, it is void by the ſtatute, and is not a ſingle obligation; and the ſtatute was made to prevent ſuch great oppreſſions; for the party ſo taken after the return, may not be bailed without coming before a Judge; and he may not do this out of term, without the conſent of the other party. *Sid.* 301. *R. Raym.* 349. *S. P.*

*L.* gives bond to the ſheriff, being arreſted by attachment out of the *Chancery*. The condition was, that the defendant ſhould appear ſuch a day in *Chancery*, *apud Weſtm.* whereſoever we may be. This bond is within the ſtatute, but here the variance makes it void. 3 *Keb. Rep.* 191. *pl.* 40. 599. *pl.* 36, 614. *pl.* 75. *Styl.* 234.

The ſheriff, by virtue of an attachment under the privy ſeal of the court of requeſts, took the defendant, and for his enlargement made the obligation to appear before the King's council, *&c. Per curiam* —Here is no warrant to take the body or the obligation; for the court has not any power by commiſſion, ſtatute or the *common law*. *Compl. Sher.* 121.

Upon a bond iſſuing out of a court that had no authority to grant it, this bond was ſaid to be taken by *dureſs*, and ſo avoidable by the award of the court, *Cro. El.* 646. although it was alledged, that the ſheriff took it by colour of his office.

The ſame on an attachment in *Chancery*. *Dalt.* 521. *Stile* 234.

The ſheriff ought to obey the proceſs out of the *Dutchy-court*, for that is appointed by act of parliament, but the other is not within the ſtatute; for the ſtatute ſpeaks of ſuch who are in their cuſtody by courſe of law. So this obligation is avoidable by *dureſs*. *Cro. El.* 646. 2 *Anderſ.* 122.

Plaint in a court-baron of 39 *s.* and an attachment againſt the defendant's goods, and detained till the plaintiff cauſed a 40 *l.* bond to be made to the plaintiff himſelf to appear and anſwer, and condemnation by a day, and pleaded the ſtatute of 23 *H.* 6. *c.* 10. this bond is void at *common law*.

It is void alſo for extortion, becauſe of the unreaſonable ſums, *&c.* and the ſtatute does not extend to ſuch a bond. *Keb. Rep.* 872. *pl.* 23.

The condition was to appear before the Juſtices of *K. B.* at *Weſtminſter*, and ſaith not *to hold pleas before us whereſoever*, *&c.* the variance is not material, and by common intendment it is the ſame court. *T. J.* 46.

The

The ſtatute ſays, that he ſhall take obligation with ſureties; but this is for the benefit of the ſheriff, that is for his indemnity; that if he be *amerced* for non-appearance of the party, he ſhall have his remedy, for he may take what ſureties he thinks fit. *Mo.* 636.

If the ſheriff takes an obligation for appearance, it is not void by *ſtat.* 23 *H.* 6. for inſufficiency of the ſureties, or that the ſurety had no land; for the ſheriff may take one ſurety or two. *Lev.* 86. *Com. Dig.* 506. *Lil. Abr.* 233.

An action upon the caſe againſt the ſheriff of *Middleſex* for an eſcape; to which the defendant pleaded *not guilty*, and nothing appeared againſt the ſheriff, but that he took a bail-bond with one ſurety only in the bond, *viz.* the party himſelf and another; and it was held well *by the whole court*; and as to his not appearing at the day, no action will lie againſt the ſheriff, but he muſt be *amerced.* One pledge is ſufficient, where pledges are to be found. So in bail-bond, if the ſheriff takes one bail, it is enough, though the words of the act are ſufficient ſureties in the plural number; but in the caſe of a bail-bond, the ſufficiency of the bail is not traverſable. *Forteſc. Rep.* 369.

The ſheriff is judge of the ſufficiency, and it is no plea to ſay he took bonds of inſufficient perſons. *Mo.* 118.

And though the ſurety be not an inhabitant in the county, nor had eſtate there.

The party that gives the bond, muſt be in the ward of the ſheriff. 10 *Rep.* 99. *b. Winch.* 20, 50. *R. Raym.* 353.

On a condition to appear; the defendant on *oyer* pleads the ſtatute of 23 *H.* 6. that the plaintiff (bailiff of *St. Edmondſbury)* impriſoned the defendant without warrant, and thereon took the bond. *Per curiam*—It is an ill plea; for the bond muſt be taken of the perſon in cuſtody, *i. e.* lawful cuſtody; and this bond is voidable by *dureſs* at *common law.* 3 *Keb. Rep.* 756. *pl.* 37. *Id.* 760. 47. 2 *Jo.* 76.

The ſheriff on a *fieri fac.* took bond of the defendant to pay the money into court at the return of the writ; this is good, and not void by ſtatute 23 *H.* 6. 10 *Rep.* 99.

*Colore officii* is taken in *malam partem.* Sheriff ſhall not take obligation contrary to the ſtatute *colore officii*, as if one in execution eſcapes and is retaken, and then a bond is made for his enlargement, this is *colore officii.* But if a ſheriff take a bond for a true debt, this is good, becauſe it is not *colore officii.* 2. *Leon.* 118. *pl.*

*In*

*In debt* on obligation taken by the plaintiff ſheriff, or the defendant his clerk on condition to pay the king's ſilver into the *Exchequer* within *fourteen days* after he received it. The defendant pleads ſtat. 23 *H.* 6. and averred it was taken *by colour of his office*. And on demurrer it was *adjudged* for the plaintiff; for the ſtatute does not intend ſuch obligation taken of them which are not to appear, nor in cuſtody. The plea that the bond is taken *by colour of his office*, will not avoid a bond taken of the party to do what he ought. *Mo.* 542. *pl.* 717.

A bond for tuition of a child as a curator, and to give account to the *Ordinary*, is but a voluntary undertaking of the guardian, and ſo not within the ſtatute 23 *H.* 6. and it is good at *Common law*, notwithſtanding 3 *Inſt.* 149. 3 *Keb. Rep.* 690. *pl.* 44.

*Note*; If the one part of the condition be according to the ſtatute, and the other not, all ſhall be void; for the ſtatute extends to the whole bond. *Plowd.* 68. *b. Palm.* 378.

If the ſheriff take bond for a point againſt this law, and alſo for a debt, the whole bond is void. *Hob.* 14.

If it be good in ſubſtance, though not in ſome circumſtances, yet within the ſtatute. *Cro. Jac.* 286.

*Note*; The warden of the *Fleet*, and the king's palace at *Weſtminſter*, are excepted out of this act.

Note; *This is a particular private law, and ought to be pleaded.*

A condition was, that *J. S.* appeared in *K. B. &c.* the defendant demands *oyer*, and ſo demurred, becauſe it is not taken by the ſheriff in the name of his office, *but not allowed*; the ſtatute being not pleaded, no exception can be taken againſt it, for it muſt be a juſt debt. *Saund.* 155. *Sid.* 24. *Hob.* 13. *contra.* 3 *Keb. Rep.* 320. *pl.* 8. *Id.* 361. *pl.* 36.

On an action againſt the late ſheriff for ſuffering an eſcape, and returning *cepi corpus*, *&c.* hereupon judgment was given for the plaintiff, and the reaſon thereof entered, becauſe the defendant had not pleaded the ſtatute, and ſhewn the matter of fact, of which they would not take notice, unleſs it was pleaded. *Twiſden* juſtice ſaid, it had formerly been ſettled ſo; yet he thought it ought to be ruled and ſettled otherwiſe; but the court would not recede from their former reſolutions and judgments: and therefore it was *adjudged* for the plaintiff. *Saund.* 153, 155.

Where

Where the arreſt is in one county, and the bond taken in another county, this bond was ſaid to be out of the ſtatute; and the only proper remedy which the defendant has to avoid it, is to plead by *dureſs* to it. *Cro. Jac.* 745.

A condition to appear in *K. B.* according to cuſtom, at the ſuit of *M.* on *oyer* the defendant pleads, there is no ſuch cuſtom in *K. B.* as the plaintiff has alledged, to appear to an *ac etiam billæ*, and ſo the obligation is void. The plaintiff demurs, and judgment for the plaintiff; becauſe the ſtatute 23 *H.* 6. is not pleaded, being a particular law. But it might be pleaded the bond was by *dureſs*, being in another manner than the ſtatute allows; and that ſtatute makes the bond void for the whole. 3 *Keb. Rep.* 160. *pl.* 31. *Id.* 181. *pl.* 21.

If the ſtatute be miſrecited, it may be demurred to. *Sid.* 356. 2 *Keb. Rep.* 278. *pl.* 44.

To plead an appearance, and not to ſay, *as appears by the record*, is naught.

On the ſheriff's bond it muſt be averred to be on record in the rejoinder, as well as in the bar. *Brownl.* 91. *Cro. El.* 466. 2 *Keb. Rep.* 205. *pl.* 41. *Sid.* 329. *pl.* 11. 2 *Keb.* 278. *pl.* 45.

A condition was, if he appeared at *Weſtminſter* ſuch a day, to anſwer, &c. The defendant pleads, that before the day of the return of the writ, the term was adjourned to *H.* and that there he appeared. The plaintiff demurs. He ought to conclude his plea, *as appears by the record*; for though he appears, yet if his appearance be not entered of record, he forfeits his obligation; and he ought to conclude his plea ſo, otherwiſe the plaintiff cannot anſwer thereto, as to ſay, *nul tiel record*. *Cro. El.* 466.

In debt on a ſheriff's bond for appearance in *K. B.* the defendant pleads *comperuit ad diem*; the plaintiff denies it, and by *mittimus* out of the *Chancery* it was brought into the *Common Pleas*, and judgment there given. *Cro. Car.* 297.

Though the bond is made void by act of parliament, yet the party may not plead *non eſt factum*, but muſt plead the ſpecial matter, and take advantage of the act of parliament. 5 *Rep.* 117.

In debt on bond, the defendant pleads the ſtatute of 23 *H.* 6. and ſhews that *W.* was in execution, and that the bond was made for his deliverance againſt the ſtatute. The plaintiff replies, that *tempore confectionis* of the ſaid bond *W.* was at large; *abſque hoc*, that he was in priſon *tempore confectionis*, the traverſe is not good: for one may be in priſon, and make a promiſe to make a bond, for which he is enlarged, and within an hour after he makes the bond, the ſame

ſame is within the ſtatute; it ought to have been *abſque hoc*, that it was made *on conſideration*. 2 *Leon.* 107. 2 *Keb. Rep.* 512. *pl.* 5.

In debt on bond, dated 25 *Sep.* the defendant pleads that a *capias ad ſatisfaciend'* was awarded againſt *B.* who was taken on it the 30th of *September*, and that the obligation was made for the enlargement of *B.* The plaintiff demurs, and had judgment; becauſe it appears the bond was made before the arreſt, and ſo could not be avoided by 23 *H.* 6. but he ought to have pleaded it with a *primo deliberat'* after the arreſt. *Noy* 23.

To an action of *debt* on bail-bond to appear, the defendant pleads, before the day he was taken by *capias utlagat'* and detained till after the day, and ſo could not appear; the plaintiff demurred; and it was *adjudged* to be an ill plea; for the party may remove himſelf by *habeas corpus*, and if this ſhould be good, all bail-bonds may be thus avoided; and the plaintiff does but his duty. 2 *Keb. Rep.* 622. *pl.* 14. *Sid.* 456. *pl.* 26.

In debt, the defendant pleaded the ſtatute 23 *H.* 6. and that was for eaſe and favour, and not for a juſt debt. The plaintiff replies, that it was for a juſt debt; without this, that it was for eaſe and favour. To which the defendant rejoins ſpecially, and the rejoinder was ſet aſide in the vacation, by *Rainsford* Juſtice; and the plaintiff entered judgment for not joining on the iſſue tendered by the plaintiff. *Per curiam*—The judgment was affirmed. 2 *Keb. Rep.* 554. *pl.* 42.

Note. *When an iſſue and rule is given, the other party muſt join, and cannot depart to any new matter.*

A ſheriff brought an action of *debt* on a bond, dated the 13th of *June*; the defendant demands *oyer* of the condition, which was, that if he appears *on Friday next after three weeks of the Holy Trinity*, and pleads, that *Friday next after three weeks of the Holy Trinity was* 14 *June*, and that he was impriſoned by the plaintiff till the 19th of *June*, and that the obligation *above was firſt delivered* by the defendant of *June*; *without this*, that this was delivered as his deed before the 19th of *June*. *Sid.* 300. *pl.* 6. 2 *Keb. Rep.* 108. *pl.* 45, 109. *pl.* 48, 122. *pl.* 74.

*Per curiam*—This is not a good traverſe; it ought to have been, *without this*, that it was delivered as his deed before *Friday next after three weeks of the Holy Trinity*; for if the traverſe above be allowed, the plaintiff ſhall be excluded from anſwering to the time alledged of the return, although it be falſe.

The defendant pleads *ſtat.* 23 *H.* 6. and that he was in cuſtody by warrant on a writ returned *on Friday next after the octave of the Purification*; the plaintiff replied, the defendant was taken by a warrant on a writ returned *Saturday next after the octave of the Purification*; and not by any writ returned *Friday, &c.* The defendant rejoined, that he was in cuſtody by virtue of a writ returned *Friday after the octave of the Purification, without this*, that he was taken by any writ returned *Saturday after the octave*, &c. The plaintiff demurs. *Per curiam*—This is no traverſe on a traverſe, and there would be no traverſe in the replication, which would make an end, but in the rejoinder it does. 2 *Keb. Rep.* 94. *pl.* 16, 195. *pl.* 39. *Saund.* 20. 3 *Keb. Rep.* 656. *pl.* 11, 191. *pl.* 40.

In debt on bond; the writ was *to anſwer* H. G. *late ſheriff of* Norfolk, and the count was, *that he acknowledged himſelf to be bound to the aforeſaid* J. H. *in the aforeſaid forty pounds*, and ſays not, *then being ſheriff of* Norfolk; and on demurrer on the bar, it was adjudged *by the court, that it was inſufficient.* *Cro. Eliz.* 800. 3 *Keb. Rep.* 191. *pl.* 40.

*J. S.* being made ſpecial bailiff arreſts *J. D.* and takes bond, *&c.* this is by *dureſs*, and the defendant may plead that; yet it is not within the ſtatute, nor aided by it. For *J. D.* was never in the ſheriff's cuſtody after the arreſt, and the bond was taken out of the county where he was arreſted, and ſo by *dureſs.* *Cro. El.* 746. 3 *Keb. Rep.* 756. *pl.* 37. 760. *pl.* 47.

The defendant pleads to the ſheriff's bond, that there was no writ ever delivered to the ſheriff, and ſo would avoid it by *ſtat.* 23 *H.* 6. The ſheriff after the writ ſent out, but before the delivery, takes ſecurity: *Per curiam*—He may, if the defendant will give it. *Keb. Rep.* 554. *pl.* 66.

If the appearance be the ſame term, it is good. The defendant pleads to a ſheriff's bond, taken for his appearance in *K. B. on Saturday next after octave of Saint Martin*, and that he appeared at the day: and the court of *Common Pleas* gave him a day to bring the record of his appearance by *mittimus* out of *Chancery.* And the record was certified, that he appeared *on Monday next after* 15 *days of Saint Martin*, which was after the day: and adjudged good. *Brownl.* 58, 74.

The parties appeared *two days* after the day in the condition; it is good, and ſhall be a diſcharge of the bond; for the whole term is but one day in law. The ſame practice in the *Common Pleas*, and in the *King's Bench.* 2 *Bulſtr.* 255.

A deb-

A debtor having given bond to the ſheriff to appear; though a *ſuperſedeas* comes to the ſheriff before the day of appearance, yet he ſhall appear to ſave his bond.

A ſheriff ſues his bail-bond for non-appearance: the defendant pleads *that he appeared at the day.* The plaintiff replies, *no record of ſuch appearance.* The defendant rejoins, *that there is ſuch record.* Now the proof lies on the defendant's part, to produce the record in court.

On a condition to appear in the *K. B.* where the proceſs is returnable, *&c.* The defendant ſaid *in facto* that he appeared *according to the form; and this he deſires, and* a repleader was awarded, for it muſt be tried by the record.

*A.* is bound to appear ſuch a day, *&c.* and *A.* at the ſaid day goes to the court; but there, no proceſs is returned. Then the party may go to one of the chief clerks of the court, and pray him to take a note of his appearance. *Leon.* 90.

If the other party pleads *nul tiel record*, it behoves that the defendant have the record ready at his peril: for the court of *Common Pleas* cannot write to the Juſtices of the *King's Bench*, to certify a record thither.

After ſtatute 23 *H.* 6. the ſheriff could not make a ſpecial return on a *capias*; but only a *Cepi corpus* or *non eſt inventus:* and the ſtatute, though it compels him to take bail, yet it does not alter the return. The deſign of the ſtatute is, to provide againſt the extortion of ſheriffs, being obliged to return *cepi & paratum habeo*, and yet to let the defendant at large; and therefore there is no reaſon he ſhould be charged for not having the body at the day.

The return of a *paratum habeo*, is in effect no more than that he has the body ready to bring into court, when the court ſhall command him.

The ſheriff for his falſe return of *paratum habeo*, is *amerceable* to the court till he do bring in the body; but that is nothing to the party, and no action lies againſt him by the party. *Mod. Rep.* 244.

If the ſheriff refuſes to take bail, he is liable to an action of falſe impriſonment.

If the ſheriff refuſes to take reaſonable bail, an action on the caſe lies againſt him. *Sid.* 23.

If the ſheriff take inſufficient bail, yet no action lies againſt him by the party; for he is judge of the bail.

An action on the caſe againſt the ſheriff for an eſcape: The defendant pleads ſtatute 23 *H.* 6. that he let *H.* to bail, and took reaſonable ſureties, *A.* and *B.* perſons having ſufficient within the county. The plaintiff replies, *abſque hoc*, that he took bail, having ſufficient within the county. The defendant demurs, and judgment was given for defendant. *Mod. Rep.* 227.

Where an action of treſpaſs on the caſe was brought againſt the ſheriffs of *Middleſex* for ſuffering an eſcape, and returning *cepi corpus*, and *paratum habeo* (which was falſe;) the defendants plead, that the party arreſted put in *J. B.* and *J. C.* ſureties, and plead ſtatute 23 *H.* 6. and they took bond according to the ſtatute, and ſo let him eſcape. *Per curiam*—The plea is good for the reaſons aforeſaid. If the ſheriff returns a *languidus in priſonâ*, having taking bail *according to the ſtatute*; it was *adjudged*, that though the defendant was at large, yet no action lay againſt the ſheriff. All this muſt be underſtood of *meſne proceſs*, for elſe this meaſure would fruſtrate ſtatute 23 *H.* 6. *Cro. El.* 852.

Note. *It muſt appear to the court on the record, that it is on the ſtatute* 23 *H.* 6. *and not a return at* common law; *and the ſheriff may in ſuch caſe plead* not guilty. *Sid.* 22.

If the ſheriff demurs to the declaration, then the action is againſt him: for *the declaration ſhall be taken to be true on the demurrer.* For the ſtatute is private, and the court will not take notice of it unleſs it be pleaded. But if the defendant had pleaded this ſpecially, or if he had pleaded *non culp'*, he might have had advantage of the ſtatute and *ouſted* the plaintiff of his action. *Cro. El.* 624. *Sid.* 439. *Mod. Rep.* 244. *Cro. El.* 460.

By theſe words in the ſtatute, *that if the ſheriff return a* cepi corpus, *he ſhall be chargeable to have the body at the day of the return, &c.* it is intended only that he may be *amerced* to the King for not having the body at the day. 2 *Saund.* 60.

An action on the caſe againſt the ſheriff for not taking reaſonable ſureties, not having ſufficient eſtates in the ſaid county, and returning a *cepi corpus*, and yet not having the bodies ready by the day, lies not; for he is compellable to let to bail, and if he have not the body he ſhall be *amerced*; and becauſe he ſhall be *amerced*, the ſtatute gives him advice to take ſufficient ſureties for his own indemnity. 2 *Saund.* 59.

In

In action on the caſe for taking inſufficient bail: the defendant pleads, he had taken ſufficient ſecurity. He need not ſay where, nor need he traverſe the intent to deceive the plaintiff of his debt: for it is not iſſuable at what place the ſecurity was given, and therefore need not be be ſhewed, and the intent is not traverſeable; and had the defendant pleaded ſo, it had been ill. *Sid.* 96.

On an action on the caſe againſt a ſheriff for taking inſufficient bail: the defendant pleads ſtatute 23 *H.* 6. *c.* 10 The plaintiff demurs to the bar, becauſe the ſheriff had not alledged, that he had diſmiſſed him on bail (whom he had taken) by ſufficient mainpernors; but only alledged this by way of implication, and not poſitively. 2 *Saund.* 58.

The ſheriff is liable to an action for taking inſufficient bail, as well as to *amerciaments*. *R. Raym.* 425. *Salk.* 99.

In an action of debt on a ſheriff's bond, the principal in priſon may be admitted to plead, diſcharging the *amerciaments*, (and this is the courſe of the court) where the proſecution is freſh: but where the defendant in the original action, *viz.* the principal is become inſolvent; the bail-bond is the only remedy, and they will not diſcharge that on ordinary rules. In this caſe the continuance of proceſs on the bail-bond was prayed, in regard ſince the default of the appearance of the principal, he is become inſolvent by ſuffering ſeveral judgments. But it was ſaid, that the bail appeared on the very day of the return, and the default is the plaintiff's own, and the bond not above a year old. And, *by the court*—Paying the *amerciaments* and coſts, the bail were diſcharged, and the principal admitted to plead. 2 *Keb. Rep.* 545. *pl.* 14. *Id.* 553. *pl.* 38.

The ſurety paid the debt, and he ſued the bail-bond aſſigned by the ſheriff; on which a writ being directed to the coroners, they took a new bond, and aſſigned it; and they prayed the money out of the coroner's hands for the ſurety. *Per curiam*—The coroner cannot diſcharge his bail-bond, no more than the ſheriff. And they ordered the principal debt to be paid. 2 *Keb. Rep.* 287. *pl.* 61. *Id.* 400. *pl.* 3.

A bail-bond was diſcharged on motion, the money being paid before the return of the writ, and common appearance ordered.

If the defendant appears not to the ſheriff's bond according to the condition thereof, the plaintiff may (by the leave of the ſheriff) ſue the bond in the ſheriff's name; but it is at the plaintiff's election to ſue the ſheriff: and the ſheriff ſhall be *amerced* till he aſſign the obligation to the plaintiff. *Sid.* 24. *Bac. Abr.* 206.

The

The assignment of bail-bonds to the plaintiff is no new thing; it was a common practice before the statute 4 *Ann. c.* 16. and though in strictness of law, a bond being a *chose in action*, such assignments were not good, yet such assignments have been taken notice of in courts of law, and not suffered to be evaded.

This statute is not in nature of an authority to the sheriff, but a judgment in parliament, that the sheriff shall do it, and he is liable to an action if he does not; and in *Chancery* may be compelled to a specific performance, according to this statute.

Two reasons induced the legislature to make this act of parliament: the one to obviate the abusive practice of sheriffs, in releasing these bonds; and thereby cutting off the plaintiffs from the advantage of them, for whose security alone they were taken. The other was to remove the *chicane* of the law, that those bonds were not assignable, because *choses in action*.

Had the statute only made the bail-bond assignable, and not said by whom; the law would have said, that the sheriff was the person to assign it.

As to the objection that may be made, that the circumstances required by the statute to be observed in assigning, make it necessary for the sheriff to do it in person: it may be answered, that the reason of prescribing these circumstances, was only to make the assignment more effectual; and to distinguish the assignments by virtue of this act, from those in use before.

An assignment made after the year is not good.

The statute enjoining the assignment to be under the hand and seal of the sheriff, did make it a personal act.

If the sheriff dies before assignment, his executor cannot do it. This is *casus omissus*; and the plaintiff must sue in the sheriff's name, as at the *common law* before this act. 10 *Mod.* 288.

If bail is put in *de bene esse*, (as bail taken in a chamber) the plaintiff cannot sue the sheriff's bond till it be refused or set aside; but he ought to except against it in the Judge's bail-book. *Keb. Rep.* 478. *pl.* 5.

The court cannot compel a sheriff to assign his bond, regularly; but in some cases they will: as where the party was arrested by the sheriff, and through his default in not returning the writ the defendant died.

Now

Now in this caſe, he ſhall not take advantage in his own wrong; but ſhall aſſign the bail-bond, or pay the utmoſt *amerciaments*. 2 *Keb. Rep.* 388. *pl.* 37.

By *ſtat.* 4 *Ann. cap.* 16. *ſect.* 20. "If any ſhall be arreſted by proceſs out of the courts at *Weſtminſter*, at the ſuit of a common perſon, and the ſheriff or officer taketh bail, the ſheriff at the requeſt and coſts of the plaintiff or his attorney, ſhall aſſign the bail-bond to the plaintiff, by indorſing the ſame, and atteſting it under his hand and ſeal in the preſence of two witneſſes, without ſtamp, provided the aſſignment be ſtamped before any action be brought thereon. And if the ſecurity be forfeited, the plaintiff after aſſignment may bring an action thereupon in his own name; and the court may by rule give ſuch relief to the plaintiff and defendant in the original action, and to the bail, upon the ſecurity, as is agreeable to the Juſtices; and ſuch rules of court ſhall have the nature of a defeazance to ſuch bail-bond."

It was moved in the *K. B.* to ſtay proceedings on a bail-bond, on diſcharging the *amerciaments* and coſts (as is uſual.) But it was alledged on the other ſide, that after the ſame bail given, the principal had *ſold his land*, and became *irreſponſible*, and rendered himſelf to the *Marſhalſea*. And for this cauſe the court refuſed to ſtay proceedings, and ſaid it could not be done until he had given ſpecial bail; becauſe they did not cauſe him to appear at firſt, according to their obligation. And ſo it is, when the principal on ſuch default of appearance becomes a bankrupt. *Sid.* 386. And it ſeems where the under-ſheriff delays executing a writ, *&c.* till the party has aliened, *&c.* he himſelf ought to be anſwerable.

An action was brought by the aſſignee of a bail-bond on ſtatute 4 & 5 *Ann. c.* 16. *ſ.* 20. and the defendant pleaded that the principal was not arreſted by the perſon at the ſuit of the plaintiff by virtue of the *latitat*, as in the declaration mentioned; to which the plaintiff demurred; the defendant urged that there is a condition precedent in the above act, if the party be arreſted; but judgment was given for the plaintiff.

*Per curiam*—The defendant firſt pleads the ſtatute of 23d *H.* 6. and ſays by *proteſtation*, that this bond was taken *by colour of office* of the ſheriff; and then pleads the ſaid plea. The words are, if any one ſhall be arreſted by writ, bill or proceſs, and the ſheriff ſhall take bail from ſuch perſon againſt whom ſuch writ, bill or proceſs is taken out, the ſheriff ſhall aſſign; ſo the laſt words ſay only where a proceſs is taken out, and it would be odd to ſay no bail-bond ſhould be aſſigned but where the party is actually arreſted, though he ſhould appear without an arreſt. *Forteſc. Rep.* 364. *Sra.* 444. See *Id.* 643.

The

The plaintiff brings an action on an aſſignment of a bail-bond; the defendant pleads that at the time of the aſſignment they were not ſheriffs, but out of their office, and two others were ſheriffs at that time; the plaintiff demurs; judgment is given for the plaintiff. *Held* it was a good aſſignment, and a good deſcription of the party and ſheriffs. *Forteſc. Rep.* 364.

In *debt* by an aſſignee of a bail-bond, the writ appeared to be returnable *oct' Hil.* which was the 23d of *January*, and the bail-bond ſaid to be taken the 17th of *December* before the return of the writ; defendant pleads ſtatute 23d *H.* 6. and that the bail-bond was taken, *ſſ.* at a certain place, the 25th of *January*, after the return of the writ; *abſque hoc*, that the bond was made the 17th of *December* at *Weſtminſter*. The plaintiff demurs; and judgment for the plaintiff. *Per cur'* —The plea makes the place where the bond was made material, which the court held to be naught. Though the bond was made two days after the return of the writ, yet it is good, becauſe the defendant has *four days* to put in bail by the practice of the court, which the court will take notice of. *Forteſc. Rep.* 365.

An action was brought on an aſſignment of a bail-bond; the defendant pleads ſtatute 23d *H.* 6. and ſays it was a bond made for eaſe and favour, and ſo void; the plaintiff demurs.

*Per curiam*—It is no good plea; for, ſince the ſtatute, the plaintiff ſets out the proceſs and the bond, and that the bond was to appear only at the return of the writ; and the defendant affirming it was a bond for eaſe and favour, ought to have traverſed the condition ſet out by the plaintiff; alſo here are two affirmatives only, which cannot make an iſſue; and where a condition of a bond is ſet out, *ad reſpond'* the plaintiff *de pli'to tranſgr. acetiam billæ pro* 200*l.* and does not ſay *billæ ipſius* the plaintiff, yet it is well; for it cannot be a bill to be exhibited by any other. *Forteſc. Rep.* 365.

In *debt* on aſſignment of a bail-bond was brought in *London*, and in the declaration it appears the bond was made in *Surry*, and that the aſſignment by the ſheriff of *Surry* was laid in *London*; it was held well, for the action was brought on the aſſignment. *Forteſc. Rep.* 366. 2 *Stra.* 727. *Raym.* 1455.

In *debt* on an aſſignment of bail-bond, if there be a *profert* to the bond it is enough, and need not ſet down the names of the witneſſes. *Forteſc. Rep.* 366.

In *debt* on an aſſignment of a bail-bond, and it appears on the face of the declaration that the writ was an *acetiam* for 30*l.* and the bail-bond for 40*l.* ſo the bail was taken in a greater ſum than the debt,

againſt *ſtat.* 12 *Geo.* 2. *c.* 19. [made perpetual by 21 *Geo.* 2. *c.* 23.] and there was a demurrer to the declaration. 2dly, It was excepted, firſt, That the plaintiff has not ſet out that the writ was indorſed; but not allowed: 2dly, That the bail-bond being more than the ſum in the writ, makes the bond void.

*Per curiam*—If it were void, it ought to be pleaded; but this bond is not void; and the act only makes it a miſdemeanor in the officer, and the act is only directory. And the court of *Exchequer* was of the ſame opinion. *Forteſc. Rep.* 366.

In *debt*, on an aſſignment of a bail-bond, a general demurrer was to the declaration. The exception to it was, that the bail-bond was for 410 *l.* whereas the *acetiam* was only for 400 *l.* now, he obſerved, that *ſtat.* 12 *Geo.* 2. *c.* 29. requires, that bail ſhould be given to the ſheriff for no more than the debt ſworn to, and that appears by the *acetiam*; and as this is a general law, he thought the exception might be well taken in this way. But ſaid, on the other ſide, that he had known complaints to the court of *Common Pleas* of officers taking more bail than the ſum ſworn to, and they would not make any rules upon them, where the bail-bond was made pretty reaſonable. The court ſaid, that they thought here were two queſtions of conſiderable difficulty; one, whether the ſtatute intended to reſtrain the ſum contained in the penalty of the bond to the ſum ſworn to; or whether the legiſlature conſidered bail according to the legal ſignification of the word, and ſo to reſtrain the ſheriff only from taking double the ſum ſworn to, as a ſecurity for the debt? The other queſtion was, admitting the act of the ſheriff to have been illegal, whether the bond ſhould be conſidered as void, or the ſheriff only puniſhable for taking it?

To the firſt of theſe queſtions the court ſeemed to be in a good deal of doubt; but at laſt *Reynolds* Juſtice ſaid, that bonds to the ſheriff are not given as a ſecurity for the debt, but only for the party's appearance; and therefore he could not ſee much reaſon there was for the ſtatute, conſidering the eſtimate of the penalty of the bond to be according to double the ſum: but he thought the proper regulation of it was, according to the very ſum ſworn to. And he ſaid, that before this ſtatute, he believed it was a very common thing for the ſheriff to take very little more than the ſum contained in the *acetiam*. However, as to the other queſtion, the Chief Juſtice, as well as *Reynold* Juſtice, ſeemed to think it would be hard to avoid the bond on this account. *Barnard. K. B. Rep. page* 181.

Mr. *Fazakerly* ſaid, that he did not know, whether it would be neceſſary for him to endeavour to ſhew, that the bond was void; becauſe the preſent action was not brought by the ſheriff, but by the

plaintiff in the original action. He obſerved that the plaintiff in the original action could not entitle himſelf to this, but by bringing himſelf within the terms of *ſtat.* 4 *Ann. c.* 16. *ſ.* 20. This ſtatute indeed does allow of the aſſignment of bail-bonds; but then it muſt be underſtood only of ſuch as are lawfully taken; and therefore if any bond was given contrary to *ſtat. Hen.* 6. this ſtatute has always been conſtrued not to extend to it.

Now the ſtatute of 12 *Geo.* 2. *c.* 29. which the preſent queſtion is on, has only added ſome other reſtrictions to theſe bonds beſides thoſe required of them before. And therefore, he ſaid, that it is equally neceſſary, that a bail-bond ſhould be made in purſuance of this ſtatute, to bring it within the intent of *ſtat.* 4 *Ann. c.* 16. *ſ.* 20. and that it ſhould be made in purſuance of the firſt ſtatute. But that the preſent bond was not within the meaning of the laſt ſtatute, he ſaid, was plain; becauſe the words of it are, that ſuch bonds ſhall be for the ſum ſworn to be due, and no more. And he obſerved, that theſe bonds were always given as a ſecurity for the appearance of the party, and not as a ſecurity for the debt; and therefore there was no colour that ſuch bond ſhould be taken in double the ſum, and conſequently the words *(for the ſum)* muſt be underſtood the ſame as if they had been *(in the ſum.)*

This argument was ſufficient to determine the preſent queſtion; however, to make it more clear, he offered a reaſon to ſhew that the caſe would have been the ſame, if the action had been brought by the ſheriff himſelf; becauſe he had no authority to take bail at all in theſe caſes at *common law*, and the bonds he does take are only by the authority of parliament. He ſaid, where theſe bonds are not within theſe ſtatutes, they muſt be conſidered as unlawful bonds; and then this muſt fall under a general principle of the *common law*, that ſecurities taken unlawfully by any officer, under colour of legal authority, are void in themſelves, *(they being conſidered as taken by extortion,)* and conſequently, when they appear ſo on record, the party may demur generally, and demand whether he ſhall be required to give an anſwer.

To the firſt of theſe objections, it was ſaid, that the true deſign of this act of parliament which the queſtion turns upon, was to prevent perſons being held to bail by the ſheriff in the ſum the action is brought for, which was the practice then; and it was provided therefore, that no perſon ſhould be held to bail in any greater ſum than the plaintiff ſhould ſwear was his due.

It was obſerved, that nothing could be a more natural conſtruction upon this act, than that as before the bail taken by the ſheriff was or double the ſum in the *acetiam*, ſo now the bail taken by him ſhould

ſhould be for double the ſum ſworn to; and this equally regulated the ſum, as if it ſhould be exactly the ſame.

To the ſecond objection it was ſaid, that there were caſes where the acts were held to be illegal by ſtatute law as well as the *common law*, and yet not allowed to be void, but puniſhable in a proper manner; and to this purpoſe was applied a caſe in 2 *Inſt.* 131.

*Page* Juſtice ſaid, that he thought it unqueſtionable, that the bond was not aſſignable in the preſent caſe, if it did not clearly comply with the intent of this laſt act of parliament; but he thought it did, for the reaſon juſt before mentioned, and compared it to the caſe of the *acetiam*.

The reſt of the court were of opinion, that the bond was not within the act, as the intent of bail-bonds is not to ſecure the debt, but the appearance of the party; and therefore, whatever the practice might have been before of the ſheriff's taking double the ſum in the *acetiam*, they thought that was not a regulation, which he was confined to by the law, but merely a voluntary one *choſe* by himſelf to be a guide to his diſcretion; for before, if the ſheriff had held the party to bail in any ſum, he was only puniſhable for his oppreſſion, but the bond could not be avoided. As this, then, is to be taken to be a bond not within the meaning of this laſt ſtatute, they thought it was not aſſignable, no more than a bond not regulated according to the reſtrictions of the firſt act. *Barnard. K. B.* 188.

On motion for the judgment of the court—They ſaid, that ſince this cauſe has been depending here, there have been actions of the ſame ſort, both in the *Common Pleas* and *Exchequer*, wherein this ſame point has come in queſtion; both of which courts have been of opinion, that bail-bonds may be taken in double the ſum contained in the *acetiam*. All the court, except Judge *Page*, ſaid, that in their private opinion they were not ſatisfied with the reaſons of theſe reſolutions; however, that there might be an uniformity in their judgments, they were willing to give judgment for the plaintiff; eſpecially, too, becauſe when actions come here by original, the party will have opportunity of bringing a writ of error immediately in parliament; and then this queſtion may be finally ſettled at leſs expence. Accordingly, that judgment was given. *Barnard. K. B. Rep. page* 326.

An action was brought by the executor of an aſſignee of a bail-bond; it was objected the act ſays, the aſſignee ſhall bring an action. Judgment for the plaintiff; it is an intereſt veſted, which will go to the executor. *Forteſc. Rep.* 367. *Prac. Reg. C. P.* 68.

Here *ſtat. H.* 6. and *ſtat* 12 *Geo.* 2. *c.* 29. were pleaded, and judgment for the plaintiff; and here the indorſement of the writ was ſet out different from the *acetiam*. *Fortſc. Rep.* 367.

In debt, by the aſſignee of *William Morris*, bailiff of liberty *Decani & Capital' Eccleſiæ Collegiat'* of *Weſtminſter*, inſtead of *Capituli Eccleſiæ, &c.* and judgment for the plaintiff. Objected, Not ſaid aſſignment under hand and ſeal. Anſwer, It is ſaid in the declaration, the aſſignment was *ſigillat' & atteſtat'*; it was held well, becauſe in the very words of the ſtatute. *Forteſc. Rep.* 307.

*Nil debit* pleaded to an aſſignment of a bail-bond, held not a good plea. *Forteſc. Rep.* 367.

The proceſs was an action of trover to the damage 100 *l.* and the condition of the bond was, to appear to anſwer to a *pleaof treſpaſs on the caſe, on promiſes, to the damage of* 100 *l.* this was urged to be a variance.

*By the whole court*—The *ſtat.* 23 *H.* 6. being pleaded, there were only three things required ſo as to make the bond good, *i. e.* 1ſt. it muſt be by the name of office; 2dly, To appear at a proper time; 3dly, At a proper place. *To anſwer* is only ſurpluſage, and ſhall be rejected. *Forteſc. Rep.* 368.

On error from the *Common Pleas*, in actions of debt on bail-bonds, exception was taken that it was not ſhewn, that the bonds were to the ſheriff by the name of his office, as *ſtat.* 23 *H.* 6. *c.* 10. requires. The court held, that it ſhould ſo appear; but they thought it did ſufficiently appear on the whole declaration, it being laid *ſolvend' eidem vicecomiti et aſſignatis*. Judgment affirmed. 2 *Stra.* 893.

On a *writ of error* on a judgment in the *Common Pleas*, given there by default in an action brought by one as aſſignee of a bail-bond. The error aſſigned was, that there was a defect in the declaration, in as much it appears to be a bail-bond, that was given to the ſheriff, and yet the bond itſelf does not appear to be given to him by the name of his office; for the obligation is only to *Edward Perſon*, generally. And firſt it was ſaid, that it was not a clear point, whether ſtatute 23 *H.* 6. on which this bail-bond was given, was not a general law, which the court is bound to take notice of. And if ſo, he ſaid, it was clear they might take advantage of this error, though they have not pleaded the ſtatute. But what was chiefly relied upon, was, that this action is founded upon *ſtat.* 4 *Ann. c.* 16. *ſ.* 20. which is a general ſtatute; and no action can be brought by an aſſignee of a bail-bond upon this ſtatute, unleſs the bail-bond is a good one; ſo that

that now by a mean the court is bound to take notice of the first ſtatute, to ſee whether this is a bail-bond, within that law, or not.

To the firſt of theſe points, the court ſaid, it has been held, that ſtatute 23 *H.* 6. is a private law; and therefore, if the ſecond does not help you, it is clear you cannot take advantage of it. Now as to that, the court ſaid, that the words of the ſtatute for the amendment of the law are, that any plaintiff may take an aſſignment of a bond given to any ſheriff or other officer for his appearance; here the plaintiff has ſhewn himſelf to be ſuch aſſignee; and conſequently he may recover upon it. If indeed the words of this ſtatute had been, that any plaintiff might take an aſſignment of a bail-bond given to the ſheriff, the court ſeemed to think, that there might be a good deal in the objection. But as they were not, the court affirmed the judgment, *niſi. Barnard. K. B. Rep. page* 72.

In *debt* on bond for 18 *l.* the defendant demanded *oyer* of the condition, ſet forth ſtatute *H.* 6. and farther pleaded, that a plaint was laid in the Palace Court in *Southwark* againſt one for 20 *l.* that thereupon proceſs iſſued to a verger and miniſter of the court, who did arreſt the party, *at Weſtminſter, within the juriſdiction of the aforeſaid court*; and accordingly took the ſaid bond of her in the name of the plaintiff, for her appearance, for eaſe and favour. The plaintiff replies, that the plaintiff was under-marſhal and keeper of the priſon of the ſaid Palace Court, erected by letters patent in the reign of King *Charles* the ſecond, *vigore & ſecundum formam ſtatut' infra Weſtmonaſter' prædict'*; and that the bond was made to the plaintiff; *without this*, that the bond was taken in the name of the plaintiff, in the manner mentioned by the defendant. Upon this iſſue was joined, and a verdict found for the plaintiff. Motion in arreſt of judgment. The objection relied upon was, that the bond does not appear to have been given to the plaintiff in the name of his office. Agreed that the defendant did not demand *oyer*; but then the plaintiff ought to have ſet it forth in his replication: and prayed that the bond might be inrolled: to which purpoſe *Carth.* 301. *Lutw.* 680. were cited; it was likewiſe obſerved, that the plaint ſet forth in the plea is for a greater cauſe of action, than the ſum mentioned in the bond; and therefore the cauſes of action could not be intended to be the ſame. To this it was anſwered, that the Palace Court appears by the record to have been erected long ſince *ſtat.* 23 *H.* 6. and therefore that ſtatute could not extend to the caſe in queſtion. To this purpoſe was cited the opinion of the eleven Judges againſt one, in *Salk.* 373. that the ſtatute of 21 *Jac.* requiring informations to be brought in the proper county where the offence ariſes, does not extend to offences for which informations lie by ſubſequent acts of parliament. Beſides, the bond on which the preſent action was brought, does not appear

appear to have been a bail-bond; and if ſo, there was no colour for either of theſe exceptions. Now, as to that, wherever a defendant may plead, that the bond was taken by *dureſs*, the bond ſhould not be conſidered, as taken by virtue of the ſtatute. And that wherever it did not appear, that the bond was taken within the officer's juriſdiction, ſuch bond may be pleaded to have been taken by *dureſs*. For this purpoſe were cited *Cro.* 745. *Cro.* 309. *Dy.* 120. Now in the preſent caſe the bond did not appear to have been taken within the juriſdiction of the court. Agreed that the defendant had alledged in his plea, that bond was taken at *Weſtminſter*, within the juriſdiction of the court. But that fact is found againſt defendant by the verdict. And nothing of this is admitted in ths plaintiff's replication. It is only admitted there, that the bond was given *infra Weſtmonaſter' prædict'*. But one part of *Weſtminſter* may be within the juriſdiction, and one part out of it. And for this purpoſe was cited the caſe of *Darby* v. *Reydock*. The Chief Juſtice ſaid, that he took it clear, that the *Weſtmonaſter' prædict'* in the plaintiff's replication, and the *Weſtmonaſter' infra juriſdiction' cur'* alledged in the plea, muſt be underſtood to be the ſame place. 2 *Barnard. K. B. Rep. page* 67. It muſt be agreed even by the other ſide, that the plaintiff might well declare upon the bond generally, without ſetting forth that it was given to him in the name of his office, and when the defendant would avoid this bond by *ſtat.* 23 *H.* 6. plaintiff might well reply, that it was given to him in the name of his office; and this will be no departure.

The queſtion, therefore, for the conſideration of the court, is, whether the plaintiff, by his replication, has ſufficiently ſhewn, that this bond was given to him in the name of his office? He has averred, that it was given *vigore & ſecundum formam ſtatut'*; and that was a ſufficient averment after a verdict, that this bond was given to him in the name of his office. However, if this ſhould not be taken to be a ſufficient averment after a verdict; yet the plaintiff ought to have judgment, by reaſon that the iſſue is joined upon a collateral matter, and thereby the averment made unneceſſary. This latter part of the argument was inforced by two caſes out of *Lev.* 254. *Saund.* 156. where ſuch averment is not in the record; and yet the plaintiff had judgment. It was conceived, that neither the want nor inſufficiency of ſuch an averment would be cured by a verdict; and 2 *Saund.* 177. was relied upon.

*Lee* Juſtice ſaid, the difficulty with him was, what ſenſe ſhould be put upon the words *vigore & ſecundum formam ſtatut'*, he did agree, that if the ſenſe of it was, that the plaintiff took the bond exactly according to the preciſe terms and directions of the ſtatute, this would be good after a verdict, without ſhewing in particular, what thoſe directions were that he followed. But, conſidering that the

defendant had pleaded that this bond was taken in the plaintiff's name, he took the ſenſe of that clauſe to be noting more, than that the plaintiff took this bond under the ſtatute, *abſq' hoc*, that *Birley* took it. For which reaſon, he thought that the plaintiff had intirely omitted ſhewing, that he purſued the directions of the ſtatute in taking the bond; which he took to be neceſſary for the plaintiff to have done, as the caſe comes out upon the defendant's plea, in order to maintain his action. To this purpoſe, he put the caſe of a man's declaring in a general manner in debt upon bond, as the plaintiff has done here, and the defendant's pleading *ſtat.* 23 *H.* 6. as he has done here likewiſe. Suppoſe, he ſaid, the defendant's plea is ill in ſome point of form, and the plaintiff demurs ſpecially. He took it in that caſe, it has been held, that the plaintiff, in his replication, muſt ſet forth, that the bond was given to him in the name of his office, otherwiſe the demurrer will be bad. For which reaſon he thought the judgment ought to be arreſted. However, the reſt of the court was of a different opinion; and ſaid, they thought the words *ſecundum formam ſtatut'* would after a verdict imply, that the bond was given according to the directions and form of the ſtatute; though *Probyn* Juſtice agreed, if the words had been *vigore ſtatut'* only, it would have been otherwiſe. Accordingly, judgment was given for the plaintiff. 2 *Barnard. K. B. Rep. page* 199.

In caſe on an aſſignment of a bail-bond, it was ſet out in the declaration that the bond was aſſigned to the uſe of the plaintiff, whereas the act is, ſhall be aſſigned to the plaintiff.

*Per Cur'*—It is all one, and held well. *Forteſc. Rep.* 369.

The plaintiff brought debt on an aſſignment of the ſheriff to her, ſhe ſuing in the original action as adminiſtratrix for a debt of 20 *l.* and there was a demurrer generally to the declaration. It was objected for the defendant, that this was an aſſignment to her in her own right, and ſhe muſt ſue in her own name, and not as adminiſtratrix; *ergo* it is wrong; becauſe the action is brought in the *detinet*, and not in the *debet* and *detinet*. 2dly, It is not ſaid to be a bail-bond, only ſaid that bond was given to ſheriff to appear, *&c.* and it has no date, and the bond is in the penalty of 24 *l.* and the writ but of 20 *l.*

*Per Cur'*—Judgment for the plaintiff; for it muſt purſue the nature of the original action, becauſe it will be aſſets; and is not ſhewn for cauſe that it was in the *detinet* only, and a bond is good without a date; and as to the ſum in the bond above the *acetiam*, that makes not the bond void. *Forteſc. Rep.* 370.

Objected,

Objected, here is no breach aſſigned, becauſe it is averred only that the money was not paid to the plaintiff; but it is not averred, that the money in the bond was not paid to the ſheriff.

*By the whole court*—It is well enough; for the ſheriff had aſſigned it over. So the judgment of *K. B.* was affirmed. *Forteſc. Rep.* 371.

In the declaration the aſſignment of the bail-bond was ſet out to be atteſted in the preſence of one witneſs, naming him, *John Weaver*; on *Nil debet* pleaded, and demurrer, it was held wrong; it ſhould be in the preſence of two witneſſes, by ſtatute; on this the plaintiff diſcontinued. *Forteſc. Rep.* 371.

A ſpecial original was taken out, returnable *coram domino rege ubicunque tunc fuerit in Angliâ*, and the bail-bond was without the words *ubicunque*, *&c.* and in an action upon it, it was objected, that by *ſtat.* 23 *H.* 6. (which was pleaded) the ſheriff could take no bond, but ſuch as was to appear at the place in the writ mentioned; whereas this might be to compel an appearance out of *England*, if the King ſhould happen ſo to be. *Per Curiam*—There are no ſet forms of words for theſe bonds, but if in ſubſtance they are to appear according to the deſign of the writ, it is ſufficient. 2 *Cro.* 216. 2 *Vent.* 237. 2 *Show.* 51. 2 *Lev.* 180.

*Trin.* 3 *Geo.* 2. In the *Exchequer*. On a *quo minus*, the bond was, to appear in the office of pleas in the court of *Exchequer* at *Weſtminſter*; and that was held well enough, though the proceſs was to appear before the barons. We will underſtand, that by appearing before the King, is meant *before the King in his court*, and not before the King in perſon. The plaintiff muſt have judgment. 2 *Stra.* 1155 See *id.* 153.

In an action brought by the plaintiff as aſſignee of a bail-bond, the defendant pleaded a frivolous plea; and on that there was a demurrer. Exception to the declaration, that the plaintiff had not ſet forth the time when the bill of *Middleſex*, for which the bail-bond was given, was taken out; and he ſaid, theſe writs have no *teſte*, and therefore the time it was ſued out is neceſſary to be ſet forth, for by that it would appear, what time there was for the return; and if there was a term intervening, the writ was a void writ; and of conſequence the bail-bond taken without authority. The court ſaid, that the defendant has pleaded *Quod bene & verum eſt*, he was arreſted by this writ, which ſhews, that the writ was not void; for if it was, he could not have been arreſted by it. Beſides, they ſay, if there was ſuch a fault in the writ, the defendant ought to have ſhewn it in his plea. Accordingly, judgment was given for the plaintiff. *Barnard. K. B. Rep. page* 347.

In

In debt upon a bail-bond the plaintiff declares that a proceſs iſſued out of the palace-court, and that by virtue of it the defendant was arreſted in *Weſt'*; upon which the defendant gave his bond for his deliverance. The defendant pleads *ſtat.* 23 *Hen.* 6. and ſhews many particulars in which the bond is void by virtue of it. Upon this the plaintiff demurs generally. Exception to the declaration, that *Weſt'* does not appear to be within the juriſdiction of the palace-court, and of conſequence this bond cannot be taken to be upon that ſtatute, but at common law; and therefore the plea was not good. To ſupport this exception he cited *Dy.* 120 *Lutw.* 680. The court ſeemed to think there was a good deal of weight in it; and therefore gave judgment for the defendant, unleſs cauſe ſhewn the ſecond day of the next term. *Cro.* 309. *Barnard. K. B.* 336.

In an action on a bail-bond, the defendant prayed *oyer* of the bond and condition; then by his plea ſet forth *ſtat.* 23 *Hen.* 6. and averred, that the bond was given by him for eaſe and favour of one *J. D.* or to be diſcharged from his impriſonment.

The plaintiffs by their replication ſet forth, that an attachment iſſued out of *Chancery* againſt one *J. D.* in a certain ſuit there at the inſtance of a private perſon, that thereupon the ſaid *J. D.* was arreſted, and for his deliverance the preſent bond was given, *abſque hoc*, that it was given for eaſe and favour of the ſaid *J. D.* or to be diſcharged from his impriſonment.

To this replication there was a demurrer, and the cauſes ſpecially ſhewn, that the traverſe contains matter uncertain, and untraverſable, and that the plaintiffs have not ſufficiently averred their traverſe. Argument in ſupport of the demurrer; that though the concluſion of the defendant's plea was in the words of the plaintiffs traverſe, yet it contained in it doubtful matter, and was uncertain; and therefore the iſſue ought to have been joined in ſuch a manner as that the traverſe ſhould have been of ſuch matter only, as ſhould have made it ſingle, and likewiſe certain. That the traverſe was not ſufficiently averred; for it is in the ſingular number, *& hoc paratus eſt verificare*, whereas it ought to have been in the plural, by reaſon that there was two perſons joint plaintiff's; ſo, for the ſame reaſon, the beginning of the replication was bad likewiſe; for it is *ab actione ſua præcludi non debet.* For which purpoſe was cited 2 *Lutw.* 1529. and the caſe of *The Queen* v. *Ingram*, *Trin.* 11 *Ann.* There two were indicted for an aſſault and battery; in arreſt of judgment it was moved, that the indictment was uncertain, it being, *inſultum fecit & verberaver'*. The court held they could give judgment for the battery, by reaſon of the word *verberaver'*; but Lord *Macclesfield* agreed it was bad for the aſſault. He obſerved farther, the bond ſet out upon the *oyer* varied from that ſet out in the declaration; for in the declaration it

is alledged, that the defendant was bound by the name of *G. S. Mercator in Holborn in com' Mid'*; whereas upon the *oyer*, the words in *com' Mid'* are omitted.

But beſides theſe exceptions, which went to the form only of the proceedings, the bond was void, as being againſt the ſtatute of 23 *H.* 6. for, as he apprehended, no ſuch bond could be taken upon an attachment; and for this purpoſe cited 3 *Leon.* 208. 2 *Ander.* 122. and the caſe of *Beel* v. *Watford*, *Mich.* 4 *Geo.* in the court of *Common Pleas*. There *M.* was taken upon an attachment, wherein was the very ſame form of the words as in the preſent one, *to anſwer ſuch matter as ſhould be objected againſt him*; a bail-bond given upon that; and the court held it to be void; cited *Dy.* 564. *Salk.* 608. to ſhew that the bond was legal. *Page* Juſtice ſaid, he remembered in the *Exchequer* a man was held to be bailable upon it. However, as this cauſe was too ſpecial for the laſt paper-day, it ſtood over, 2 *Barnard K. B. Rep.* 268.

Though the bail taken by the ſheriff be ever ſo good, yet the *plaintiff may refuſe an aſſignment* of it, *and proceed againſt the ſheriff by amercements*; therefore it behoves him to take good bail. It is true the ſheriff ſhall not be brought in contempt for not bringing in the body, but the only way is to amerce him, and the ſheriff may proceed on the bail-bond; and the plaintiff, by *ſtat.* 23 *H.* 6. *c.* 10. *has election* of bail or amercement. 12 *Mod.* 447. Lord *Raym.* 723. *Bac. Abr.* 206.

The way upon taking aſſignment of bail-bond is, to *indorſe a promiſe* upon it, *to ſave the ſheriff harmleſs againſt amercements*, and yet the bond continues ſtill in the ſheriff's cuſtody. 12 *Mod.* 516.

The *ſheriff*, upon aſſignment, does *not part with* the poſſeſſion of *the bond*, becauſe if the plaintiff be nonſuited the ſheriff muſt be indemnified; but he *muſt produce it at the trial*. By *Holt* Ch. J. 12 *Mod.* 527.

In debt upon a bail-bond, as aſſignee of the ſheriff of *Suſſex*, according to *ſtat.* 4 *Ann. c.* 16. *ſ.* 20. and *declared generally without ſhewing* matter ſpecially, *that it was a ſheriff's bond*, which by ſaid act is aſſignable; to which there was *a demurrer*. *By the court*—It ſhould have been ſhewn that it was a bond aſſignable. And when Mr. *S.* found the opinion of the court againſt him, he prayed to diſcontinue, which was granted on payment of coſts. 11 *Mod.* 170. *pl.* 7.

*Holt* Chief Juſtice ſaid, that on an action by an aſſignee of a ſheriff's bond, it is enough to *ſet forth*, that the bond was *pro comparentia* of

the defendant, and there is no need of setting out the *matter at large*. 11 *Mod.* 237.

*Holt* Chief Justice made it a rule of court, and ordered it to be screen'd up in the office, that a *bail-bond* shall not be *assigned in town till four days after the writ*, and *not till* six days *after the return in a country cause*. 11 *Mod.* 253. *pl.* 4.

In debt by assignee of a bail-bond; it was objected to the declaration, on a demurrer, that the breach of the condition *was set forth to be, his not appearing secundum exigentiam brevis, nor* set forth *on what day the writ was returnable*, and then *non constat*, whether he did appear or not *secundum exigentiam brevis*, and so whether the bond was forfeited or not. And *Parker* Chief Justice held, the not setting forth the return of the writ to be a fatal objection. Adjourned. 10 *Mod.* 190, 191.

H. *a high-sheriff did*, by a legal instrument, *make* L. *his under-sheriff in trust for* A. who had been under-sheriff the year before; *neither* L. *nor* A. *took the oaths required by* 27 El. c. 12. *after* H.'s *year was expired, and before a new sheriff was appointed*, A. *makes an assignment of a bail-bond*; and the question was, whether *A.* was such a person, as that his assignment of the bail-bond was a good assignment within *stat.* 4 *Ann. c.* 16. *s.* 20. (N. B. *A.* always acted as under-sheriff, and *L.* not at all.) 10 *Mod.* 288.

*Parker* C. J. said, he had the advice of all his brothers, and they were of opinion, that an under-sheriff himself might assign a bail-bond in the name of the high-sheriff, it having been the constant practice ever since *stat.* 4 *Ann.* but that if the assignment was neither by the high-sheriff nor his under-sheriff, it would not be good. And that being the present case, the defendant had judgment. *Stra.* 60.

An action of debt was brought upon an assignment of a bail-bond taken by the sheriff, who had arrested the defendant upon a *capias*, &c. and upon a demurrer to the declaration, it was objected, that the plaintiff had *not set forth the capias, or the teste or return of any capias*, as he ought to have done; and the court of *C. B.* being of that opinion, a writ of error was brought in *K. B.* but the judgment of *C. B.* was affirmed; for it is the *capias* which gives life to the bond. 8 *Mod.* 78.

Assignees of a bail-bond by the sheriff *brought debt, and had judgment by nil dicit*; whereupon error was brought, because it was not shewn that the sheriff *assigned the bond to them by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses*, as *stat.* 4 *Ann. c.* 16. *par* 20. directs, but only alled-

ges *that the ſheriff, at the coſts of the plaintiff in the ſuit, according to the form of the ſtatute in that caſe lately made* and provided, *did aſſign* to the plaintiffs the ſaid bond. But the court unanimouſly over-ruled the exceptions; All defects (which would have been aided by verdict) being aided after judgment by *nil dicit*, by the ſame act of 4 *Ann.* And it being expreſsly alledged that the bond was aſſigned *ſecundum formam ſtatuti*; judgment was affirmed. 2 *Ld. Raym. Rep.* 1564.

The ſheriff cannot bail one committed for felony, except it be by the King's ſpecial writ directed to him for that purpoſe.

A man indicted for treſpaſs, or any the like offence, before juſtices of the peace, and thereupon committed to priſon, may upon the King's writ be bailed by the ſheriff to appear at ſeſſions.

Upon a *ſuperſedeas*, the ſheriff may bail a man ſued or indicted, &c. whereupon a *capias* or *exigent* ſhall be awarded againſt him, and the party thereupon impriſoned.

He may take bail upon an attachment, *pro pace*, by the expreſs words of the writ.

If he take inſufficient bail for an appearance, and the plaintiff refuſes it, he is liable to an action, and alſo to be amerced. *Salk.* 99. *Ld. Raym.* 425.

But in either caſe, if the plaintiff take an aſſignment of the bail-bond (though the bail be inſufficient) the ſheriff is not to be amerced. *Salk.* 99. 12 *Mod.* 447, 527.

The ſheriff cannot take bail on an attachment for a contempt, becauſe it is in nature of an execution. *Com. Rep.* 264. *pl.* 145. *Barnes's Notes C. P.* 53. *Caſ. of Pract. C.* 14, 100. 5 *Vin. Abr.* 450. *pl.* 29. 3 *Leon.* 208. *Dy.* 264. 2 *Vent.* 237. *Gilb. Eq. Rep.* 84. unleſs at a judge's chambers. *Stra.* 479. *Ld. Raym.* 723. See 12 *Mod.* 557.

The defendant being ſheriff, and having taken up a man upon an attachment, took a bail-bond from a ſufficient bail for his appearance. It was moved by *Raymond*, that the *proſecutor* ſhould be *compelled to take an aſſignment* of the bail-bond; and this, he ſaid, was frequently granted in the *Common Pleas*, where the obligee was a ſufficient perſon. But the court denied the motion. 12 *Mod.* 579.

The plaintiff may either accept an aſſignment, or proceed againſt the ſheriff by amercements, and the ſheriff may reimburſe himſelf by ſuing the bail-bond; but if the bond is not ſufficient, he is without remedy. 2 *Salk.* 608. *pl.* 1. *Ld. Raym. Rep.* 722. 12 *Mod.* 579.

The

## *The Sheriff's Duty as to returning Writs.*

### *The Nature of Returns.*

A Return is but a certificate made by the ſheriff or bailiff to the court from whence the writ iſſued, of that which they have done touching the execution of the ſame writs. *Dalt. Sher.* 662. 2 *Lil. Abr.* 583.

A return may be on the *eſſoin-day*. A writ ſhall not abate if the return be *Quarto die poſt*.

If a man be bound to appear the firſt day in term in court, he may appear the firſt day of the *eſſoin*, and then have his appearance recorded; and this is good. 2 *Bulſt.*

If on a *fieri facias* all the money is not levied, the writ muſt be returned before a ſecond execution can be taken out; for that muſt be grounded on the firſt writ, and recite that all the money was not levied on the firſt; but if on the firſt all the money had been levied, the writ need not have been returned, for no farther proceſs was neceſſary. *Salk.* 318. *pl.* 1.

### *How long a* Scire Facias *is to lay in the Office againſt Bail.*

ON the irregularity of a *ſcire facias* againſt bail's being referred to the maſter, he reported, that a *ſcire facias* was returned on it; but that it did not lie in the office *four days* before the return. And whether this was requiſite, or not, was the queſtion. Argued, that it was not; and 2 *Salk.* 599. relied on. However, the other ſide ſaid, they had two caſes directly with them later than this in *Salk.* One was that of *Olgar* v. *Staples*, *Trin.* 1724, the other that of *Gilbert* v. *Billingſly*. The maſter ſaid, too, that in the book of practice left him by his father, there is no diſtinction between two *nihils* and a *ſcire feci* in this repect; and conſtant experience is, that each of the *ſcire facias's* muſt lie in the office *four days*, where two *nihils* are returned. The court thought this the moſt reaſonable; but, however, ordered this matter to be farther inquired into. *Barnard K. B. Rep.* 364.

Where the writ or proceſs is directed to the biſhop, there the biſhop is to make return thereof: and ſo where the writ is directed to other

other perſons (as *coroners*) they are to make returns. *Dalt. Sher.* 162, 537.

Deputies are allowed in miniſterial offices: but all returns made by them are to be made in the name of the principal officer. 3 *Bulſt.* 78.

*The ſheriff muſt return true, and not contrary to the record*; if he does, it falſifies all his proceedings. For example; *L.* brought treſpaſs againſt *J. G.* widow; pending the ſuit, ſhe takes *D.* to huſband; judgment was againſt *J. G.* and a writ was directed to the ſheriff, *quod caperet* J. *prædictam, per nomen* J. G. *ad ſatisfaciend', &c.* the ſheriff cannot now return that ſhe was married. *Cro. Jac.* 323.

*The return muſt not be contrary to the former return.* If the preceding ſheriff return upon the *Venire fac'* twelve jurors, the ſucceeding one on the *diſtringas* cannot return that one juror had nothing, for this is againſt his former return, *ſtat.* 19 *H.* 6. 38. for if he had at firſt, and alien ſince, yet he is chargeable with iſſues. But if the land be recovered by *Eign title* in the mean time, he may return it with this concluſion, *Et iſſint nihil habet.* The ſame if he had land in the right of his wife, and ſhe is dead in the mean time. *Ibid.*

The return of the *nihil* was by a ſucceeding ſheriff, and by the whole court, he was *amerced*; for he muſt enſue the firſt return. For if any *juror* has *eſtate conditional, and the condition is performed, and the feoffor enters*, or ſuch like; in theſe caſes the ſheriff ought to return the ſpecial matter, and conclude, and ſo *nihil habet*, and if he was never ſufficient, he ſhall have *action of deceit* againſt his predeceſſor. *Bro. Abr.* tit. *Retorn de briefs, pl.* 40. cites 19 *H.* 6. 38. But *Fort.* and *Markam* agreed, that *if the defendant be returned ſufficient, and after nihil*, this is well; for the party may have *capias* and *exigent* againſt him; *contra* againſt the juror. *Bro. Abr.* tit. *Retorn de briefs, pl.* 49. cites 19 *H.* 6. 38. *Id.* Tit. *Action ſur le caſe, pl.* 53. cites S. C.

By *ſtat.* 12 *Ed.* 2. *c.* 5. "For returns delivered to ſheriffs by bailiffs of franchiſes, an indenture ſhall be made between the bailiff of the franchiſe and the ſheriff by his proper name; and if the ſheriff change the return ſo delivered to him by indenture, and be thereof convicted at the ſuit of the lord, or of the party that hath ſuſtained loſs, he ſhall be puniſhed by the King for his falſe return, and ſhall yield unto the lord and to the party double damages. Alſo ſheriffs and other bailiffs that receive the King's writs, ſhall ſend their own name with the returns, ſo that the court may know of whom they took ſuch returns; and if any ſheriff or other bailiff leave out his name in his returns, he ſhall be grievouſly amerced."

This

This ſtatute wills expreſsly, that the ſheriff ſhall put his name to the returns; ſo that it ſeems it was otherwiſe before. *Bro. Abr.* tit. *Retorn de brief, pl.* 81. cites 41 *Aſſ.* 29. Exception was taken that *no name was put to the certiorari returned out of the* Treaſury *into the* Chancery; and *non allocatur*; for *no miniſter ſhall put his name by the common law*, but *by the ſtatute the ſheriff ſhall put his name* to his returns, and does not ſpeak of any other officer. *Nota, Bro. Abr.* tit *Retorn de brief, pl.* 48. cites 8 *H.* 6. 27.

If a *writ of mittimus be returned with fine in* K. B. *by the treaſurer and barons of the* Exchequer; this is well, though they *do not put their names to it*; contrary of the ſheriff by the ſtatute. *Bro. Abr.* tit. *Retorn de brief, pl.* 129. cites 11 *H.* 6. 44.

In an action of *debt* on the *exigent*, a writ of *proclamation* iſſued according to the ſtatute, and it *was returned ſerved, but the ſheriff had not put his name* to the return; and for this cauſe the outlawry was challenged. *Dyer, Brown* and *Weſton*, thought this was no cauſe to reverſe the outlawry, it appearing by the return that he was lawfully demanded; for the words are, *Ad comitatum meum tantum*, and *proclamari feci*; ſo as it appears that he was made by the ſheriff, and *this ſtatute only impoſes a penalty upon the ſheriff* if he puts not his name to the return of the writ, but that the want thereof is not error; but if on the back of the writ nothing be wrote or returned, this will be error. *Welſh* and *Harpur e contra.* And that by *ſtat.* 26 *H.* 8. 3. an *exigent* was returned ſerved, and the name of the ſheriff omitted in the return; and this held error. And the clerks ſaid, that there was many precedents, where the returns for this cauſe were adjudged inſufficient. Whereupon *Dyer* ſaid, We will be adviſed of it. *Mo.* 65. *pl.* 176.

The name of the ſheriff was not to the *diſtringas*, nor to the *tales* awarded upon it, and it was tried by *Niſi prius.* It was inſiſted, that the ſheriff not putting his name does not make the return ill, and that it is helped by *ſtat.* 32 *H.* 8. *c.* which helps inſufficient returns, and no writ returned; but the court thought otherwiſe, for of neceſſity the name of the ſheriff is to be to the return, otherwiſe it appears not by what warrant it came in; and otherwiſe any man, without the ſheriff, might return writs, which would be a great inconvenience; and the ſtatute does aid only inſufficient returns, or when the writ cannot be found; ſo it may be intended it is embezzled: but here it appears, that it was never returned, wherefore it cannot be good. And it was ſaid, it was ſo ruled in *C. B.* 35 *Eliz.* and alſo in *K. B.* And for this cauſe, the judgment was ſtaid. *Cro. Eliz.* 310. *pl.* 20.

A *diſtrin-*

A *diſtringas* directed *to the coroners was returned* by them *with their names* ſubſcribed, *but leaving out the name of office*, viz. *Coronatores*, *&c.* and this was adjudged erroneous; but if they had not put their proper names, the return had been good; becauſe coroners and the chamberlain of *Cheſter are not within this ſtatute*, which requires ſheriffs to put their names to returns. The *common law* required the name of office to be ſubſcribed, whether it was ſheriff, coroner, chamberlain, *&c.* ſo at this day the ſheriff is bound to put his ſurname and name of office, but other perſons only their name of office. *Mo.* 548. *pl.* 734. *Cro. El.* 703. *pl.* 23. and that the *Ven. fac.* was returned by them and their names, *viz. A.* and *B.* were writ, and alſo the word *coronatores* added, which was omitted upon the *habeas corpora*, on which was indorſed *A.* and *B.* only. It was moved not to be error, becauſe before this ſtatue the ſheriff need not have put his proper name nor name of office to his return, and this ſtatute extends only to the ſheriffs and bailiffs of franchiſes; for the coroners to this day are out of the ſtatute: and at the *common law* it is well enough, for it was not uſual to put the ſheriff's name to returns; and for proof thereof divers precedents were ſhewn by the deputy-chamberlain of the *Exchequer*, many of which were writs of *aſſize*; the one was in 5 *Ed.* 2. aſſize againſt the abbot of *Abbington*, and one *J. S.* his commoigne, and in none of the writs the ſheriff's proper name or office was returned. And upon theſe precedents ſhewn, the court conceived it to be well enough, and no error; for when a writ is returned, it is intended to be by the very officer of the court who ought to do it, which is the reaſon, that at the *common law* the ſheriff's name needed not to be put to any return; and this reaſon holds here. But they all held, that if their names ought to have been here, then it is not aided by the ſtatutes 32 *H.* 8. nor 18 *Eliz. c.* 5. And they held, that the ſtatute of 12 *Ed.* 2. *c.* did not extend to coroners; but they would adviſe.

A *venire facias* was returned thus: *viz. Per Thomam Ravenſcroft vicecomitem, iſtud breve cum panello annexo mihi deliberatum fuit per Hanmer militem nuper vicecomitem, in exitu ab officio ſuo, & ſic indorſatur Tho. Hanmer nuper vicecomes.* It was objected, that it appears that it was returned by one who had no authority; for the ſaying *(nuper vic.)* excludes him from being ſheriff when he made the return. But three juſtices held, that the return was good enough; for he need not alledge his name of office: and by the ſtatute, the adding his *name is ſufficient, and that need be only his Chriſtian and ſirname*, and the addition of *nuper vicecomes* ſhall be intended that he returned it when he was ſheriff, and made that addition when he delivered it to the new ſheriff; and ſo ſhall not make the return void. But *Whitlock* Juſtice ſeemed to doubt, for which reaſon the court would further adviſe. *Cro. Car.* 189. *pl.* 9. 570. *pl.* 7. 2 *Rol. Rep.* 219.

[Notwith-

[notwithſtanding the difference of the years, &c.] But I do not obſerve that the court gave any opinion as to the *nuper vicecomitem*. *Palm.* 151.

*Dodderidge* Juſtice ſaid, the ſubſcribing his Chriſtian and ſirname, without ſaying *vicecomes*, is error; and *Montague* Juſtice held, that it ought to appear by the return that he was ſheriff at the time; and thereupon they and *Haughton* agreed the return void, and not aided by the ſtatute: but *Montague* doubted if the return be erroneous upon the ſtatute of *York*, becauſe the *common law* was, that a return without a name was good; and the *ſtatute of York ſays, That the ſheriff ſhall*, &c. *and if he does not, then it inflicts a penalty upon him.* And ſo it ſeems that the return is not void, but only that the ſheriff ſhall be puniſhed. But all the other juſtices ſaid, that the *common law is changed by the firſt words*, viz. *The ſheriff ſhall*, &c. and the penalty is *in terrorem* of the ſheriff, and the ſtatute was always expounded ſo, and that the practice has been accordingly. *Rol. Rep.* 210.

*Chamberlain* J. ſaid, that the judges of *C. P.* would cauſe the ſheriff's name, before the judgment given, to be ſubſcribed to the return, though it was omitted before at the time of the return. But the reporter ſays, that 5 *Rep.* 41. is againſt this opinion of *Chamberlain*. *Palm.* 191. 2 *Ld. Raym.* 886.

*Returns muſt be made according to ancient courſe, and according to precedents*; as waſte was aſſigned in *S.* the return muſt not be *quod acceſſit ad* S. but *ad locum vaſtatum.*

A return of *non inveni partem*, for *non eſt inventus*, is error, and not amendable. 9 *H.* 6. *fol.* 12.

*M.* was outlawed at the ſuit of *H.* It was moved to avoid the outlawry, becauſe the ſheriff returned the exigent on the back of the writ, thus (viz.) *ſuperdictus* M. where it ought to be *infra nominatus* M.; for nothing was written above, but within. But by all the juſtices the return was good. And it would have been the ſame if he had wrote the return on the inner ſide of the writ. *Dalt.* 164.

*Surpluſage is no hurt to the return* of a writ, as in *elegit*, and the ſheriff returns that to be executed; the extent of the church of *St. Andrews, alias dict' St. Edes*, and the true name is *Andrews*, yet good. *Winch* 27.

On a *ſcire fac'* returnable in *B. R.* If the ſheriff return *ſcire fac', &c. qd' ſit coram vobis ad faciend' qd' breve requirit*: although *vobis* had relation to the King, where the garniſhment ought to be *coram juſticiariis*

*ariis*, yet good; for these words, *ad faciend' qd' breve requirit*, comprehend all. 29 *Ed.* 3. 33. Adjudged, *every return must exactly answer the writ.*

Note. *Statutes aid misreturns and insufficient returns, but not where there is not any return.* Cro. Car. 587.

*None can make the return of a writ, but such a person who at the time of the return remains an officer to the court.*

The sheriff's return cannot be falsified by affidavit. *Comb.* 255.

Nor is his return of a *rescue* traversable. *Ibid.* 295.

For against the return of the sheriff there is not any *traverse*, *averment*, or *answer*. But this seems intended only of returns of *rescues*.

By *Maynard* Justice, in *Mod. Rep.* 248. It is held a great abuse in officers to return feigned names; the first cause of which was the ignorance of the sheriffs, who being to make returns, and looking into the precedent-books for the form, and finding *John Doe* and *Richard Roe* put for example, made their returns accordingly, and took no care for true summoners and true manucaptors. And cited the following case:

Judgment was entered in *B. R.* in a plea of *quare impedit*, on non-appearance to the *grand distress*; but there the party was summoned, and true summoners returned. On non appearance an *attachment* issued, and real summoners returned on that; but on the distress it was returned, that the defendants were distrained by their goods and chattels, and the manucaptors were *J. Doe* and *R. Roe*. And for that cause the judgment was vacated.

When the *grand distress* is awarded, it is that the sheriff is commanded to seize the thing in question.

If the defendant be taken, then at the return of the writ, the plaintiff's attorney, at the day of the return of the writ, may give a rule at the clerk of the rules for the sheriff to return his writ; or if he go out of office, then a *alistringas* to the new sheriff to distrain the old sheriff to return his writ: but if the defendant be arrested by a bailiff of a liberty, who has the execution and return of writs, then he must return his warrant back to the sheriff by rule of court, or *distringas*, directed to the sheriff to distrain the bailiff, and so *amerce* the bailiff that way. *Compl. Sher.* 148.

On

On a motion for a rule on the under-sheriff of the county of *N.* to shew cause why he did not deliver to the plaintiff the money levied on a *scire facias*, on an *affidavit*, that the defendant's goods being taken in execution, the under-sheriff wrote a letter to the bailiff to deliver them up, because he had received the debt and costs; since which the money had often been demanded of the under-sheriff, but he had not paid it. The court declared they should willingly grant the motion, if it had ever been granted before; for they have observed of late, that under-sheriffs make it a practice to delay plaintiffs their suits, and to stand out till the attachment. However, they said, they would think of some way to make under-sheriffs pay costs for their delay. The rule made at present was only, that the sheriff should return his writ. 2 *Barnard. K. B. Rep.* 33. *Comb.* 25.

On a motion for a peremptory rule on a sheriff to return a writ. The court said, that there appeared so manifest an oppression in the sheriffs, by their not executing the process duly as it ought to be, that they had resolved to grant these peremptory rules with costs: accordingly they did so in the present case. 2 *Barnard. Rep. K. B.* 88.

The sheriff had made a return of *cepi corpus*, but would not bring in the body. On which the plaintiff had obtained several rules on the sheriff to bring in the body; but the sheriff still stood out in contempt; and therefore the plaintiff prayed now an attachment against him. But the court, on hearing the rules read, said, there was not one peremptory rule; and therefore the motion for an attachment was irregular at present. However, upon a peremptory rule being then desired, the court granted it. And in another case they said that amercements only used to be the method of inforcing these rules, but lately they have granted attachments. *Barnard. K. B.* 246.

The defendant was protected by baron *Hoffman*, minister, and the protection was registered in the sheriff's office according to 7 *Ann.* A *capias ad respond.* was delivered to the sheriff of *D.* who durst not execute it, by reason of the protection, and the penalty in the act. The plaintiff served the sheriff with a Treasury-rule to return the writ, which rule was discharged by the court. 2 *Barnes's notes* 232.

A rule for *A.* late sheriff of *E.* to shew cause why he should not return several writs of *fi. fa.* and *venditioni exponas*. On cause shewn, that all the warrants on these writs were granted to special bailiffs of plaintiff's nomination; and that indemnities to the sheriff were indorsed on all the writs, and signed by plaintiff and his attorney. *Per cur.*—The rule must be absolute. The indemnities are necessary, because plaintiff may call for returns, though warrants were made to his own bailiffs. *Barnes's notes* 302, 331.

A Treaſury-rule for the late ſheriff of *D.* to return a writ of *capias ad reſpondendum* diſcharged. *T.* late under-ſheriff (as uſual in *D.*) had intruſted plaintiff's attorney with blank warrants, to be directed to bound bailiffs only; and he had filled up a warrant on this writ, and directed and delivered it to a bound bailiff, purſuant to his truſt. But it appearing that this writ, though returnable in *Eaſter term* 1751, was not carried to the ſheriff's office, or tendered to the under-ſheriff, till *April* 1752, the court thought it unreaſonable to oblige the ſheriff to make a return. 2 *Barnes* 341. *Stat.* 20 *Geo.* 2. *c.* 37. *ſ.* 2. whereby ſheriff is not obliged to return writs *ſix months* after the expiration of his office.

The under-ſheriff of *H.* ſhut himſelf up, and could not be perſonally ſerved with a rule to return the writ of *capias ad reſpondendum.* Rule that leaving a copy at his houſe ſhall be good ſervice. 2 *Barnes's notes* 31.

On motion for an attachment againſt the ſheriff of *M.* for not returning a writ of *capias ad reſpondendum*, on affidavit of ſervice of the rule on the under-ſheriff: *Per cur'*—Be it ſo, the attachment muſt be againſt the ſheriff, and the ſervice is proper upon the under-ſheriff. *Barnes's notes* 22.

The court granted a rule for an attachment againſt the ſheriff of *Middleſex*, for not returning a writ purſuant to a peremptory rule, upon an affidavit of ſervice of ſuch rule on *B.* who was ſworn to act as under-ſheriff, and not to be under-ſheriff. *Barnes's notes* 23, 293. *Rep. and Caſ. of Pract. C. P.* 23. *Pract. Reg. C. P.* 381.

An under-ſheriff returned a *fi. feci*, and a *venditioni exponas* ſued out, after two or three rules upon the ſheriff to make a return, and failure therein; an attachment was granted againſt him, the court declaring they never would grant it againſt the high-ſheriff for not returning the writ. And ſuch a rule was granted the ſame term, in the like caſe, againſt the under-ſheriff of *York.* 12 *Mod.* 454. See *Rep. and Caſ. of Pract. C. P.* 87. *March* 54. *pl.* 81.

A rule *niſi* for an attachment againſt the ſheriff of *M.* for not returning *Teſt. ca. ſa. Barnes's notes* 27. *Pract. Reg. C. P.* 381.

The ſheriff that begins an execution ſhall end it, (and conſequently make the return) though his office be expired. 2 Ld. *Raym.* 1073. *Salk.* 323. except the writ indorſed with the ſaid return be delivered over to the new ſheriff.

On the *cap'* the ſheriff returns *languidus in priſona*, and a diſtreſs ſſues to the new ſheriff to make the former ſheriff to have his priſoner;

priſoner; and the new ſheriff returns iſſues on the former ſheriff, and an *alias diſtringas* iſſues againſt the ſheriff. And after one of the counſel would have ſurmiſed, that the ſheriff againſt whom the diſtreſs iſſued was dead.

*But by the court*—He ſhall not have this by way of ſurmiſe, but it ought to come in by return of the ſheriff. *Dy.* 25. *a.*

The return of the old ſheriff ſhall not conclude the new ſheriff. On a *fi. fa.* the ſheriff returned *that he had taken goods to the value of* 10 *l*; whereupon there went out to the new ſheriff a *venditioni exponas*, who returned that his predeceſſor *non cepit bona, & ideo, &c.* and held good. 34 *H.* 6. *Cro. Jac.* 73.

In caſe againſt a bailiff for the falſe return of *nulla bona* upon a *fieri facias*, the queſtion was, on the evidence at the trial, whether the bailiff of a liberty ſhall be concluded in point of evidence by the return of the ſheriff? *Per curiam*—He is concluded. And if the ſheriff makes any other return than that which the bailiff makes to him, he may have his action againſt the ſheriff. And it was ſaid that *Holt* Chief Juſtice was of this opinion. *Stat.* 36 *Hen.* 6. 40. Ld. *Raym.* 184.

General writs of execution (except *elegit*) as *cap' ad ſatisfaciend' habere fac' ſeiſinam, habere fac' poſſeſſionem, fieri fac' liberate, &c.* which are the final proceſs, and after which no judgment is given, nor further proceſs; and when matters *en fait* are only to be done, as land to be delivered, *ſeiſin* had, goods ſold, *&c.* are good, though the words be not returned or filed (if the execution be duly made.)

In caſe of an *elegit* otherwiſe, becauſe the extent is to be made by inquiſition, to the intent that the court may judge of the ſufficiency of it. And every inquiſition ought to be of record.

A *capias* in proceſs muſt be returned. 4 *Rep.* 67. In other caſes the party is at the end of the ſuit; otherwiſe of a *cap' in proceſs*, for the end of the arreſt is, that the defendant ſhall appear. 5 *Rep.*

The writ of *retorn' habend'* is not returnable. 2 *Rol. Abr.* 434.

The ſheriff was ordered to return an *hab' fac' ſeiſinam*, the execution is good, if he do not return it. But perhaps a writ of error in parliament may be brought; and if he will not return it, the court ſhall amerce him. *Rol. Rep.*

The

The writs of *redisseisin* and *postdisseisin* are *vicontiels*, and not returnable; and the sheriff shall hold the plea, and give judgment. 2 *Inst.* 82.

So are writs of *admeasurement of pasture*, and of *dower*, and the parties may thereupon plead before the sheriff of the county. But these pleas may be removed out of the county-court by writ of *pone*. 2 *Inst.* 369.

Where the sheriff returns *cepi corpus & paratem habeo*, and brings him not in, then the writ of *duces tecum* shall be awarded, to have the body in court *sub pœna*. *Bulst.* 82.

A *scire fac'* issues out of *Chancery* to the sheriff of *H.* and the justices of peace, to call *L.* before them to take security of the peace. *L.* enters into a recognizance, and the sheriff returns; this matter is not good, the justices should have returned too. For the viscount does not meddle with them as sheriff, but by virtue of his commission only. 21 *H.* 7. 20, 21, *&c.* 2 *Rol. Rep.* 257.

If a writ be directed to a place where there are two sheriffs, as *London*, *Bristol*, *&c.* and one of them does return the writ, it is sufficient; for it must be returned in both their names, though one (according to custom) may execute it. *Bro. Abr.* tit. *Office and Officer*, *pl.* 22.

If a warrant be directed to two bailiffs of a franchise to execute a writ, the return of one of the bailiffs in the name of both is sufficient. *Cro. Eliz.* 512.

If a writ directed to the sheriff be executed, and after a new sheriff is chosen, the new sheriff ought to return the writ in this manner: *(scil.) Recepi hoc breve prædecessori meo directum sic indorsatum, &c.* 19 *Vin. Abr.* 176. *pl.* 1.

If on a warrant directed to the bailiff of a franchise to execute a writ, it be served; and after, and before the return of it, the bailiff is removed, and a new bailiff chosen, the return to the sheriff shall not be in the name of the old bailiff, but of the new bailiff in the manner aforesaid; for the old bailiff is now a mere stranger. *Ibid. pl.* 2.

If a writ directed to the sheriff is not executed by him before he is removed, and another chosen, and after the writ is executed; this shall be returned generally in the name of the new sheriff, without

out any mention of his predeceſſor. *Dalt.* 517. 2 *Rol. Abr.* 548. *pl.* 3.

The law is the ſame as to a bailiff of a franchiſe. *Id. pl.* 4. If a writ be executed by one ſheriff, and before the return of it a new ſheriff is choſen, he ought to return the writ, and not the old ſheriff, becauſe the new ſheriff is now the officer of the court. 19 *Vin. Abr.* 177. *pl.* 2.

The record is, that the *venire fac'* to try the iſſue was returned by *J. S.* ſheriff of the county of *D.* It was aſſigned for error, that *J. S.* was not then ſheriff of the ſaid county. And it was certified by a record under the ſeal of the *Exchequer*, *(viz.)* that he was ſheriff; upon which the judgment was affirmed. But ſome are of opinion, that this cannot be aſſigned for error againſt the record of the court. *Compl. Sher.* 153.

If the writ be returned by one that was not ſheriff, it is a manifeſt error; but if the defendant appear afterwards and plead, it is not material; for his appearance has made it good. *Cro. Eliz.* 582.

If the ſheriff ſhall return *Mandavi ballivo libertatis*, and ſhall not therein ſet down the proper name of the bailiff, this is good. 19 *Vin. Abr.* 185. *pl.* 13.

The ſheriff cannot ſerve a writ in part, and write to the bailiff of a liberty to execute the other part; as a writ ſerved as to part of the jurors, but if the ſheriff on a *capias* in debt againſt the three, return that he had taken two, and as to the other *Mandavit ballivo libertatis*, *&c.* good.

The common form of *vic' ret'* is, *feci quoddam warrant'*; but to the bailiff of a liberty, *mandavi*, *&c.* 2 *Rol. Rep.* 263.

*Præcipe quod reddat* was awarded *Vicecomitebus Glouc' verſus* A. B. *and* C. The ſheriff returns, that the ſaid *C.* was one of the ſheriffs of the ſaid city. *Ideo ego præfat'* C. *&c. alter vicecom' civitat' prædict' meipſum ſecundum exigentiam brevis iſtius ſummonere non poſſum.* It was adjudged a good return. *Bendl. pl.* 160.

The return was in this form, upon a writ of *entry* againſt *E. M. T. W.* and others.

*Summ' infra nominat'* E. M. R. F. J. D. *& quoad ſumm' prædict'* T. W. *juſticiar' infraſcript' certifico quod idem* T. *& ego* T. W. *jam unus vicecomit' civitatis prædict', ſum unus & idem, non alius neque diverſ',*

*ideo ego præfat'* T. & H. H. *alter vic' civit' prædict' meipsum secundum exigentiam brevis istius summ' non possumus. Respons. prædict.* T. W. *and* H. H. *vic.* Anders. 110. pl. 21.

If a writ to inquire of damages be directed to the sheriff, he ought not to make such a return, that he had commanded such a bailiff of such a liberty, &c. *Cui executio prædict' brevis totalit' restat fienda, & quod alibi infra com' prædict' per se fieri non potuit, qui quidem ballivus sic sibi respondet*, and so sets down an inquisition before the bailiff, and 40 *l.* damage. This return is erroneous, untrue, and against law; because the warrant was directed to the sheriff himself to be executed in any part of his shire, and no *venue* contained in this inquest of office, as there is in other writs, which entitles the bailiffs of liberties. But because there were divers precedents of this form, the court would not reverse it. 19 *Vin. Abr.* 194. *pl.* 2.

If the sheriff return, that the bailiff of a franchise (who had return of writs) had returned, &c. this is good, although he does not shew of what place he is bailiff. 29 *Ed.* 3. 1. *b.*

*W.* had a *cap. ad satisfac.* to the sheriff of *M.* and makes precept to the bailiff of the duchy, and the precept was *ad capiend'* H. *ad respond'* W. where it should be *ad satisfaciend'*, and the bailiff returns the precept served, and the sheriff returns to the court *cepi corpus secundum exigentiam brevis*; it was moved to have a new *cap' ad satisfaciend'* against *H.* for though the sheriff by his return had charged himself to the plaintiff, so that he may demand execution against him; yet where in truth the defendant was never taken in execution for the debt, as here, but only taken *ad respond'*, there the plaintiff is at liberty to take new process against the defendant; which the court granted. *Yelv.* 52.

*Mandavi ballivo* upon *fieri facias*, and upon *non omittas* awarded, *Vic' ret' nulla bona. Saund.* 305.

The sheriff is bound to take knowledge of the law in making his return; therefore if a *scire facias* to *L. B.* master of the *grammar school of S.* &c. and to the scholars of the same, be returned that *scire fecit* to the master, and does not say to *L. B.* master, it is a bad return. *Bro. Abr.* tit. *Ret.* 88.

In a *scire facias* the sheriff returned *scire feci* A. B. *modo & forma prout istud breve exigit & requirit*, and said not *infra nominat'* A. B. yet *per cur'* it is good, for these words *prout hoc breve exigit* are tantamount. *Bro. Abr.* tit. *Return de Briefs, pl.* 64. Ld. *Raym.* (*Rep.* 21.) says, if there is the substance, it matters not if there is not the express form.

The

The ſheriff returned *non inveni*, for *non eſt inventus*, and the party thereupon was outlawed; this was aſſigned for error, and held not amendable. *Fitzherb. Abr.* tit. *Return* 19.

A return by the ſheriff in the third perſon is not a good return. The ſheriff returned, *quod præcepit ballivo de* S. for *præcepi ballivo*, and he was *amerced* for it. 21 *Aſſ.* 17.

In treſpaſs the ſheriff returned in the *Common Bench*, that the defendant was attached *per catalla ad valentiam de* 10*l.* It is a void return, for he ought to return he was attached by one beaſt or chattel certain, and name them, that ſo they may be forfeited. *Cro. Eliz.* 13. *Andr.* 51.

In outlawry of murder the ſheriff returns, *Ad comit' meum tent' apud* D. *en le county de* Northumberland, and ſaith not *in comitat' meo Northumbræ tent'*, *&c.* it is error, for one may be ſheriff of *Cambridge* and *Huntingdon*, and of *Surry* and *Suſſex*. 2 *Rol. Rep.* 52.

On an action on the caſe, on eſcape of one taken by a *ca. ſa. ret.* 16 *Car.* 2. on a judgment entered in *Mich.* 16 *Car.* 2. which is repugnant and impoſſible; and this was moved in arreſt of judgment on the return of a writ of *inquiry*. But the teſte appearing to be *Jan.* 16 *Car.* 2. *ret' craſt' Aſcen'*, and that *virtute brevis poſtea & antea retorn'*, *viz.* ſuch a day of *May* 16. which ſhould be 17. *By the court*—This is a void return, *(viz.)* being expoſitive only. 2 *Keb. Rep.* 101. *pl.* 29.

In a replevin on the *cauſum nobis ſignifices*, if the ſheriff return, that the beaſts cannot be delivered, *quia viſum inde habere non potuit.* This is not good, becauſe he does not ſay, *acceſſit ad locum*; for perhaps he could not have the view, becauſe he did not go where the beaſts were. 2 *Ed.* 3. 54. *b.*

An outlawry was reverſed, becauſe the exigent had an uncertain return. 2 *Rep.* 141.

If a *capias* comes to the ſheriff to take a man, it is no return that he was found within his bailiwick after the delivery of the writ, *prout ſibi conſtare poterit.* This is not good, but he ought to return expreſsly, *quod non eſt inventus.* 9 *H.* 6. 57.

On a *fieri fac' de bonis teſtatoris* againſt executors, if the ſheriff returns that they have not any goods in *balliva ſua*, after the delivery of the writ *prout ei conſtare poterit:* this return is not good; for he ought to take notice whether they had goods or not, and ſo return it. 9 *H.* 6. 57. *b.*

In debt againſt an executor, who pleads *plene adminiſtravit*, and aſſets are found; on a *fieri fac'*, the ſheriff returns that he had nothing within the ſame county; it is a good return. *Bendl.* 91.

On *habere fac. ſeiſinam*, the ſheriff returns, that the party who ought to take the *ſeiſin*, *non proſecutus eſt breve*. This is not good; for the uncertain intendment of it, and the coming of the ſheriff to have ſeiſin, is not properly a proſecution of the writ. *Compl. Sher.* 158.

On entry *ſur diſſeiſin* of two acres, *hab fac' ſeiſinam* was awarded. The ſheriff as to one acre returns *habere feci*, as to the other *tarde*; the ſheriff ſhall be amerced for ſuch a return, as being contrary and repugnant in itſelf. As on a *ca. ſa.* againſt two, the ſheriff returns as to one, *cepi*, and as to the other, *tarde*; he ſhall be amerced. 2 *Leon.* 175. *pl.*

In debt againſt the heir: if the defendant pleads, Nothing deſcended to him but an houſe in *B.* upon which judgment is given for the plaintiff; *ſed quia ignoratur* of what value the houſe was, a writ iſſues to the ſheriff to inquire of the value, and according to that to make execution; and the ſheriff returns, that the heir ſold the houſe before the writ came to him. This is not a good return. 19 *Vin. Abr.* 180. (G), *pl.* 2.

In an action of debt againſt the executors, the defendant acknowledges the action, on which a *fieri fac'* iſſues, the ſheriff may return *nulla bona*, *&c.* for this ſtands with the judgment, inaſmuch as he confeſſes the action; but not that he has goods. 2 *Rol. Abr.* 459. *pl.* 3.

On *habere fac' ſeiſinam*, on a judgment againſt *J. S.* it is no good return for the ſheriff to return, that *J. S.* had nothing in the land, nor was tenant. 17 *Ed.* 3. 66. *b.*

The ſheriff on *levari* returns, that he had levied the ſaid ſum (which was 2000 *l.*) and in debt, he pleads as to 308 *l. nil debet*, and as to the reſt a releaſe from the plaintiff; the plaintiff demurs. Now the plea of *nil debet* is ill, and the ſheriff is eſtopped to plead it; for it is contray to the return. *Per cur'*—Since they have not relied upon the eſtoppel, but taken iſſue, that could give them no advantage. *Hob.* 206.

*What ſhall excuſe the Sheriff for making a bad Return, and what ſhall not.*

THE ſheriff returned a reſiſtance *habere fac' ſeiſinam*, and he was amerced 20 *marks*, becauſe he did not take the *poſſe comitatus*; and an *alias* awarded. *Hil.* 19 *Ed.* 2. *Execution* 147.

On a writ of *habere fac' ſeiſinam*, it is a good return to excuſe the ſheriff, that he at all times was ready to deliver *ſeiſin*, and appointed divers times in certain for the party to come to the land to take *ſeiſin*; but none comes for the party to receive it. 2 *Rol. Abr.* 459. *Rol. Rep.* 51. *pl.* 21.

He ought to excuſe himſelf from the time before the day aforeſaid, otherwiſe the return is not good; for peradventure he was requeſted before, and would not perform it. 19 *Vin. Abr.* 182. *Id.* 183. *pl.* 2.

It is no good return for the ſheriff to ſay, that the party will not pay his fees, and therefore that he will not execute the writ. *Bro. Abr.* tit. *Retorn de Brief, pl.* 10.

The very words of the writ do enjoin the ſheriff to make return of it; and if he be not paid his fees where he is allowed to take them, he may recover them by action. *Compl. Sher.* 160.

If a writ out of the *King's Bench* be directed to an inferior court, which the inferior court is not bound to allow, but may proceed notwithſtanding the writ directed to them; yet they ought to make a return upon the writ, and in the return to ſhew the cauſe: for the writs from above ought to be obeyed. 2 *Lil. Abr.* 583.

The ſheriff returned a protection on an arreſt. It was ſet aſide by the court, in regard the ſheriff can return nothing but *non eſt inventus*, or *cepi corpus*, at his own peril, and it is in his diſcretion to allow or diſallow any protection, and the ſheriff was ordered to return his writ on a pain. 2 *Keb. Rep.* 681. *pl.* 72.

If a man be taken in execution at the ſuit of the King; afterwards a *ſuperſedeas* comes to the ſheriff, by *ſtat.* 2 *H.* 7. *fol.* 7. he may return the *ſuperſedeas* with the body.

The ſheriff is to return the *capias* and the body at the day; but if the party diſcharges him, this is a good excuſe. 3 *Bulſt.* 96, 97.

*Note.* If a writ cannot legally be executed the day on which it is returnable, it ſhall not the following day, or at any time after. 6 *Mod.* 159.

In replevin, if the ſheriff returns, that the defendant claims property, it is a good excuſe. 19 *Vin. Abr.* 183.

The ſheriffs of *London* may return their cuſtom. *Dalt. c.* 73.

On an information for a libel, it was moved for a new trial. The reaſon given for it was, that the verdict was ill; inaſmuch as it appears that the jury was not returned by the proper officer. And to ſhew this, they ſaid, that the *diſtringas* was returned by *J. G. Mil'* and *T. L. Mic'*, whereas there was no ſuch ſheriff of *London* as *T. L. Mic'*, but *T. L. Mil'*; and this was verified by affidavit.

The court ſaid, Unleſs ſomething farther appears, this is a good exception; for they muſt take it upon what lays before them, that *T. L. Mic'* is a different perſon from *T. L. Mil'*, and if it was a different perſon that made the return, from the perſon that was ſheriff, it would certainly be ill; and there is no other way to take advantage of it but this, by moving for a new trial, and making affidavit that ſuch a one was ſheriff at the time of the return, who appears to bear a different name from him whoſe name is annexed to the return. Upon which the attorney-general ſaid, that the ſheriff's adding his title of knighthood at all to his ſigning the return is ſurpluſage; and therefore his doing it in an improper manner ſhall not make ill what was good before. He admitted indeed, that this addition was neceſſary in declarations, deeds, *&c.* for it is part of the deſcription of the perſon, as it was determined in the caſe of the biſhop of *Cheſter*; but when a man ſubſcribes his name, thoſe additions are always omitted.

The Chief Juſtice ſaid, That there is no ſuch thing as ſurpluſage in the names of perſons; and therefore, unleſs ſomething elſe appears, they muſt intend that a different perſon made the return than ought to have done it. Then the attorney-general deſired time of the court, that he might be able to verify, that *T. L. Mil'* did actually make the return; and prayed that a rule might be made, upon *T. L. Mil'*, one of the ſheriffs of *London*, to attend and inform the court, whether he did not make this return, and that upon his ſo informing the court, the return might be amended. This proceeding, the attorney-general ſaid, was warranted by 9 *Rep.* 31.

The

The court ſaid, that this was a new point; and therefore ordered it to be ſpoke to again next term. *Barnard. K. B.* 37. *Fitzgib.* 5. *pl.* 1.

On a *venire fac'* no return was indorſed, nor any name of the ſheriff on the back of the writ, *nec quod executio brevis patet in quodam panello, &c.*

*Stat.* 18 *El.* aids inſufficient returns; and it could not be amended after verdict; and a new *venire fac'* iſſued. 5 *Rep.* 41.

*Stat.* 8 *H.* 6. *c.* 12. extends to returns; but yet miſpriſions of clerks are only to be amended. But it extends not to a return by the ſheriff where it ſhould be to a coroner; nor does 18 *Eliz.*

Nor to a return of a *venire fac'* without the name of the ſheriff. *Co.* 8 *Rep.* 162.

The *venire fac'*, and other proceſs, is directed *Vicecomitibus de Canterbury*, and the return is made by one ſheriff only. The court amended this at common law, and not upon the ſtatute of *Jeofails*. And they ſwore the jury there, that there was but one ſheriff in *Canterbury*. *Sid.* 244.

*Album breve* returned is not amendable. *Mo. Rep.* 1196.

## *Where the Return of the Sheriff ſhall be amended, as well after Verdict as before.*

HAVING now treated largely of the inſufficiency and validity of returns in general, I ſhall conſider how the law is in caſes where the ſheriff doth not return the writ; or what act, proceſs or appearance, ſhall be good before the return, and the penalty on the ſheriff for not returning.

Where a man is to loſe an inheritance if he do not appear, he ſhall appear without the return of the ſheriff *gratis*, by a day in the roll. *Stat.* 10 *H.* 7. 11.

Where a man is to have a corporal pain if he does not appear, he may appear without the return of the ſheriff *gratis*. *Ibidem.*

In treſpaſs: If after the *exigent* is iſſued, the defendant renders himhimſelf, and had a *ſuperſedeas*, he may appear by the roll, although the ſheriff does not return the *exigent* at the day. 38 *Ed.* 3. 20. *b.*

In a writ of debt, if no original be returned, nor any return made, yet the defendant may appear by the roll. 29 *Ed.* 3. 19.

In

In a writ of debt, if the ſheriff return the original *nihil, &c.* yet the defendant may appear for fear of a *capias*.

The court will diſcharge priſoners on common bail in two terms. They will inflict penalties on ſheriffs for not making deputies; and will (whether in office or not) impriſon them for not returning of writs by the day, and not leave them to amerciaments, or *diſtringas nuper vicecomit'*. 2 *Keb. Rep.* 812. *pl.* 14.

In *Bulſtr.* 201, 202. an *habeas corpus* was directed to the warden of the *Fleet*, to bring in the body of a priſoner in his cuſtody; who refuſing to make his return, another day was given him upon pain to return the body.

If the ſheriff takes *J. S.* upon a *latitat* or *capias*, and doth not return the writ, an action lies againſt him.

Though a ſheriff be out of office, yet if it appears, that during his being in office he has made a falſe or fraudulent return, or wilfully refuſed, neglected or delayed the execution or return of a writ, the court will ſend for him into cuſtody, or order an indictment or information againſt him. See 2 *Show.* 87. a ſheriff laid by the heels for not returning a *fi. fa.* See *Indictments againſt ſheriffs*, *Tremain* 123.

In a partition, or other real action, if the ſheriff returns the tenant ſummoned, when in truth he was not, an action of *deceit* lies againſt him. 26 *Aſſ.* 48. *Brownl.* 157.

In a real action, if the demandant deliver a writ of *ſummons* to the ſheriff, and the ſheriff ſummoned the tenant accordingly, and after does not return the writ, an *action on the caſe* lies againſt him.

If the ſheriff return one ſummoned or proclaimed, which is not, an action on the caſe lies; but this is not aſſignable for error. *Mo.* 349.

An action on the caſe lies againſt the ſheriff for returning, that he had delivered to the plaintiff, on inquiſition taken, where he refuſed to deliver it, and ſo the return is falſe; though it was objected, that perhaps the poſſeſſion is kept againſt him *manu forti*. *Per cur'*— That is but mitigation of damages; but his return was falſe, and therefore the action lies. *Rol. Abr.* 738.

If the ſheriff return *exigent* 3 *aut* 4 *exact'*, that there were not more counties, where in truth there was a fifth county, the plaintiff ſhall have action on the caſe againſt him. 9 *H.* 6. 60. *b.*

*Hok*

*Holt* Chief Juſtice ſaid, If a writ comes to a ſheriff, and another make a return to it in his name, the ſheriff may come and diſavow it the ſame term, but not in a ſubſequent one. 12 *Mod.* 308. 2 *R. Raym.* 885.

On writ to the ſheriff, he firſt made a warrant to a bailiff, who arreſted the party, and ſuffered him to eſcape, and then ſheriff returned *Mandavi ballivo*; upon affidavit of fact, ſheriff was ordered to attend, and agreed action lay againſt ſheriff for a falſe return, as *non eſt invent'*, &c. and his amerciaments were eſtreated. 12 *Mod.* 311.

If a ſheriff arreſts the party, and yet returns *non eſt inventus*; action on the caſe, or treſpaſs for falſe impriſonment lies againſt him; for he is a treſpaſſer *ab initio*. *Cro. El.* 729. 18 *Ed.* 4. 18.

An action on the caſe brought againſt the ſheriff, for that he arreſted *J. S.* and ſet him at large, *abſque aliqua ſecuritate inventa* for his appearance, and at the day returned *cepi corpus*, and that the ſaid *J. S.* did not appear at the day, but hid himſelf; and that upon an *habeas corpus* awarded, he returned *paratum habeo*, which was *faux*, whereby the plaintiff was delayed in his ſuit, &c. The defendant pleaded, that *J. S.* being arreſted, put him in ſureties for his appearance, *J. N.* and *J. D.* who are perſons of ſufficient eſtate within the county, and were bound to him in 40 *l.* for appearance of *J. S.* at the day in the writ mentioned, and pleaded the ſtatute of 23 *H.* 6. *c.* 10. by reaſon whereof he let him at large; and traverſeth, *abſque hoc*, that he let him at large, *abſque aliqua ſecuritate inventa prout*, &c. *Cro. El.* 624.

The court held the plea and traverſe to be good; for he is by the ſtatute compellable to take bail, and it is left to his diſcretion what bail to take: and although he had not the body at the day, and afterwards at the day of the *habeas corpus* returned *quod paratum habeo*, when he was at large, that is a contempt to the court, and finable; but it is nothing as to the party, nor can he take advantage of it.

So that the law which has been diſputed is ſettled, that where the ſheriff takes bail according to *ſtat.* 23 *H.* 6. and returns *cepi corpus*; though the party do not appear at the day, yet the ſheriff ſhall not be charged in an action on the caſe for a falſe return. *Sid.* 22, 23. 2 *Sid.* 28. *Mo.* 590.

*Stat.* 23 *H.* 6. is a general ſtatute, of which the judges ſhall take notice: but if it does not appear to be a return within the ſtatute, but at common law, therefore his non-appearance is actionable. And there is a caſe in *Siderfin* on this point, which is worth obſervation, as to laying the action and pleading.

An action on the case was brought for a false return, *i. e. cepi corpus*, and yet he had him not at the day, but suffered him to escape. The defendant demurs to the declaration. Now the action is good, because the declaration shall be taken to be true upon this demurrer. And the statute of 23 *H.* 6. is in part a private statute, and the court will not take notice of it without pleading it. But had the defendant pleaded it specially, or had he pleaded not guilty, he might have had advantage of this statute, and have ousted the plaintiff of his action. After the said statute the sheriff cannot make a special return, but *cepi corpus* or *non est inventus*. So that *Sid.* 22, 23. as to that point, is good law, for such action lies not properly against the sheriff, because *stat.* 23 *Hen.* 6. compels him to bail the prisoner; and yet the sheriff shall return a *cepi corpus*, as formerly. *Sid.* 439.

Now it is said, that *stat.* 23 *H.* 6. *c.* 10. is a private statute, and to have been pleaded. 2 *Saund.* 154.

Now that statute is a private law as to sheriffs bonds; but as to extortious fees, it is a public law. 2 *Keb. Rep.* 626, 657. *Mod. Rep.* 33.

If a sheriff levy money on a *levari facias*, upon a recognizance, at the suit of *J. S.* and returns the writs served, *J. S.* may have debt against the sheriff, or against the sheriff's executors. But in this case the plaintiff demurred to the defendant's plea, and concluded ill. The plea was grounded on a release, and he should have demanded judgment, if the defendant should be admitted to plead a release made after the sheriff made his return. *Rol. Abr.* 518. *Brownl.* 57. *Hob.* 206.

An action on the case lies against a sheriff who accepts of a return of one that is not bailiff, and against him that made the return. *Mo.* 431.

An action on the case lies against the bailiff of a franchise for a negligent execution, or a false return. *Ibid.*

An action on the case lies against a sheriff for making other return than is returned to him by a liberty or bailiff of a franchise, who had *retorno brevium*. *Rol. Rep.* 119.

On a *fieri fac'* against an administrator, the sheriff makes a warrant to the bailiff of a franchise to execute it, and after the bailiff is removed, and another bailiff elected; and after the old bailiff returns in his own name to the sheriff, that the administrator had not any goods *præterquam*, &c. which is false, and after the sheriff makes

return

return accordingly to the court; yet no action on the case for this false return lies against the bailiff. For the return ought to have been made by the new bailiff, and so the sheriff had accepted a return from one as it were a mere stranger, and so void. And *he ought to take cognizance of the right ministers of law*; and therefore the old bailiff for his false return is not punishable by the law, but the sheriff. *Rol. Abr.* 99.

If the sheriff return *mandavi ballivo libertatis, &c. qui mihi responsum dedit, &c.* If the matter of the return be false, no action lies against the sheriff, but only against the bailiff: for the sheriff ought to accept the return of the bailiff, and not examine the reality of it, (if it be sufficient in law.) *Rol Abr.* 98, 29. *Cro. El.* 512.

If a *venire fac'* comes to the sheriff in a *quare impedit*, and the sheriff commanded the bailiff of the city of *C.* to return the panel, who does it accordingly, where he had not any warrant to do it, not being bailiff of a franchise, whereby the panel is quashed. The plaintiff for this default in the sheriff, and for his damages, shall have an action on the case. 38 *Assize* 13.

The sheriff upon a *fieri facias* against *J. P.* makes a warrant to *J. S.* to execute as his bailiff, and he does it; and afterwards the sheriff makes a false return, *(viz.)* that the writ came *tarde, &c.* by which he is a trespasser. 2 *Rol. Abr.* 562.

It was the opinion of all the judges, that the sheriff's submission to a fine, is no conclusion to the parties aggrieved, to bring their action for the false return of the sheriff, if it were so. *T. J.* 39.

On a return on an *elegit*, the sheriff returns, that he had appraised the goods *in specie* to 40 *l.* and extended such lands, and delivered them to the plaintiff. *Ubi revera* he never delivered them to the plaintiff. Action of debt lies not in this case, but an action on the case; for it is no debt in the hands of the sheriff. *Cro. Jac.* 566.

It is not like to *Pyke*'s case, which was; The sheriff on a *scire fac'* returned, that he had sold the goods for so much money, and delivered the money to the plaintiff; and the plaintiff thereupon averring that he had not the money, maintained an action of debt: for there the sheriff confessed by his return, that he had sold the goods, and delivered the money; but here it is not returned, that he meddled with the goods, or the value of them, so as there is not any certainty to charge him. *Compl. Sher.* 169.

An action for a false return may be brought in the county where it was, or in *Middlesex* where the record is. *Cro. Jac.* 532. 12 *Mod.* 408.

So eſcape at *D.* in *Wales*, and the return was *non eſt inventus*, and it was tried at *Weſtminſter*, the falſe return being made at *Weſtminſter*, which is the cauſe of the action. 2 *Keb. Rep.* 362. *pl.* 10.

If a ſheriff on *cap' utlegat'* will not arreſt the party, but return *non eſt inventus*, an action may be brought againſt him in the county where he received the writ, or in *Middleſex*, where the record of that falſe return is, at election. *Hob.* 206. *Sid.* 219.

A doubt was, whether an action on the caſe for a falſe return on an *elegit* lies in the county where the return of the *exigent* was, *i. e.* in *Middleſex*, or where the land lies? And the court inclined, that it lay moſt properly in *Middleſex*. *Winch* 100.

One brings debt againſt *B.* ſheriff of the county palatine of *Lancaſter*, and ſues him to outlawry on meſne proceſs, and had a *capias* directed to the chamberlain of the *county palatine*, who made a precept to the coroners of the county, being ſix, to take his body, and have him before the juſtices of the court of *Common Bench* at *Weſtminſter*; one of the coroners being in ſight of him, and having a fair opportunity to arreſt him, does it not, but they all return *non eſt inventus*. The plaintiff hereupon brings his action againſt the coroners in *Middelſex*; and the court inclined, that the action is well brought in *Middleſex*; becauſe the plaintiff's damages ariſe here, by not having the body here at the day. *Dy.* 159.

The chamberlain returns to the court the ſame anſwer that the coroners return to him, ſo that the falſe return is the cauſe of prejudice, and the other things are but arguments to prove it. And the court conceived an action would not lie againſt one coroner, no more than againſt one ſheriff of *London*, *York*, *&c.* *Mod. Rep.* 198.

It was alledged for error, that the declaration was naught.

1. The bond was made for 200 *l.* dated 29 *Auguſt*, 13 *Jac.* and this was before the bond made; yet being returnable in *Mich.* term, and the *latitat* upon it after the bond, it is ſufficient to maintain the action, and the proceſs always bears *teſte* the laſt day of the term before.

2. The declaration is, the ſheriff's bailiffs arreſt the party, and the ſheriff falſely returns *non eſt inventus*. It was alledged for error, that the declaration was not good, becauſe he doth not ſhew that the bailiffs delivered the bond to the ſheriff, which they had taken for his appearance; nor is it ſhewed, that the defendant did not appear; *ſed non allocatur*, for theſe ſerve but for aggravation of damages, and are ſupplied by the verdict. *Cro. Jac.* 561.

A *fu*

A *fieri fac'* for debt was delivered to the ſheriffs of *M.* who executed it; after which the ſheriffs were diſcharged of their office, and new ones elected. The old ſheriffs redeliver to the party his goods taken in execution, and indorſed *nulla bona* on the writ of *fieri fac'*, and deliver it to the new ſheriff ſo indorſed. And an action on the caſe was brought againſt the old ſheriffs for this falſe return, and judgment *for the plaintiff.* And theſe exceptions were taken.

1. The plaintiff in his declaration does not ſay, that the old ſheriffs did return *nulla bona*, but only that they did indorſe *nulla bona*, which is no return.

2. He ſays not, they delivered this writ thus indorſed to be returned, *i. e.* by indenture

3. It appears not whether any return of the writ were made by the old ſheriffs, or the new. *Per Glyn* C. J.—He conceived it to be well, and according to the courſe of that kind, for the old ſheriffs to make the return, and to deliver the writ over by indenture to the new ſheriff; and here was a verdict. And a return is not properly a return till it be filed here; yet it is the return of the ſheriff in the county where he is ſheriff; and yet it ſeems judgment was reverſed. *Stile* 474.

An action on the caſe on a falſe return of *non eſt inventus* by the ſheriff of *Galloway* in *Ireland.* It was averred, that the ſheriff at the time of the delivery of the *capias*, had the perſon in cuſtody at *Galloway*, in the city of *Dublin*, and the action is brought in the county of the city.

On a *capias* delivered to the ſheriff out of the county, he is not bound to hold him there. So upon a *latitat*, which is no warrant to the ſheriff to take him, but only in his bailiwick. *By the court*—This may be by *habeas corpus*, or freſh ſuit, and being after verdict, that finds the falſe return, (for the return was *non eſt inventus in balliva)* and the jury find that he was in *balliva* at the return of the writ, the court will preſume him legally in cuſtody. 3 *Keb. Rep.* 557 *pl.* 70. *Id.* 561. *pl.* 74. *Id.* 600. *pl.* 37.

The plaintiff declares, he had proſecuted a *capias* againſt *C.* who was indebted to the plaintiff in 100 *l.* and delivered it to the ſheriff at *Newport P.* and that the ſheriff *poſtea & adtunc & ibidem potuiſſet arreſtar'* the ſaid *C.*; but that the defendant *machinans* to delay the plaintiff, *&c. arreſtare* the ſaid *C. & adtunc & ibidem abſtinuit & recuſavit*, and had falſely returned *non eſt inventus.* Defendant pleads *non culp'*, and verdict *for the plaintiff. By the court*—After verdict the declaration is good enough; and though *potuiſſet arreſtare*, without ſhewing how,

or that the defendant was in view of *C. & potuiſſet*, denotes a poſſibility; and this is true if he were in the county, and the ſheriff is not bound to attend his office in every particular caſe; yet it ſhall be intended ſuch matter was given in evidence; by which appeared to the jury, that the ſheriff *potuiſſet arreſtare*, and the declaration, *quod recuſavit*, doth imply opportunity: but it was agreed to be a good cauſe of demurrer. *T. J.* 40.

In caſe againſt the ſheriff of *Oxfordſhire*, for a falſe return of *non eſt inventus* to an *alias capias ad ſatisfaciendum* upon a judgment of the *Common Pleas*, recovered by the plaintiff againſt one *E. J.* for 21 *l.* 10*s.* and upon error brought in the *King's Bench*, affirmed; upon which the whole ſum amounted to 43 *l.* upon not guilty pleaded, the cauſe was tried before L. C. J. *Raymond*, at *niſi prius* in *Middleſex*. *Mich.* term, 12 *Geo.* And it appeared upon the evidence, that the ſheriff's bailiffs upon the firſt *capias* had frequent opportunity of taking defendant; and that when that return was out, the under-ſheriff deſired the plaintiff's attorney to take out another *capias ad ſatisfaciendum*, and he promiſed to arreſt defendant, but he did not, though he had opportunities to arreſt him upon that writ. And the defendant in this cauſe, upon the trial, attempted in mitigation of damages to prove, that the defendant in the original action might yet be taken, but failed in that proof, it appearing *J.* had abſconded; upon which by the direction of the C. J. the jury gave the whole 43 *l.* debt in damages. And the defendant moved for a new trial; firſt, becauſe the Ch. Juſt. refuſed to admit the ſheriff's bailiff to be a witneſs upon the trial, to prove that he often endeavoured to have arreſted *J.* on this *capias ad ſatisfaciendum*, but could not. *But not allowed*; for his brothers agreed with him, the bailiff was no legal witneſs, becauſe he is intereſted in the cauſe, having given ſecurity for his due executing proceſs, and by conſequence, could not be a witneſs in his own cauſe. Then it was inſiſted upon by the counſel for the defendant, that the damages were exceſſive, becauſe the jury had given damages for the whole debt; whereas they ſaid, the jury ought to have given only the charges the plaintiff had been at in the ſuing the *capias ad ſatisfaciendum*, &c. in damages. *Sed non allocatur*; for upon the circumſtances of the caſe, the court thought it very proper the whole debt ſhould be given in damages.

*Note.* On giving the verdict, the plaintiff entered into a rule by conſent, that the ſheriff ſhould have liberty to uſe his name, in order to recover the debt againſt *J.* the ſheriff conſenting to indemnify the plaintiff againſt all coſts, &c. 2 *Raym.* 1411. *Stra.* 650.

In an action for a falſe return, the plaintiff declared, that he recovered 206 *l.* of *A. U.* and that the ſheriff of *Middleſex* directed his warrant to the defendant, as high bailiff of *Weſtminſter*, to

levy this money which he had recovered of the ſaid *A. U. unde præfat' Alexander convictus eſt.* The defendant returned upon the back of the warrant, *nulla bona, ultra* 1 *l.* within his bailiwick. For this falſe return the preſent action was brought. Upon the evidence at the trial, this warrant was produced, but there was a blank left for the name of *A. U.* ſo that the warrant required the defendant to levy this 206 *l. quas Carolus King recuperaſſet verſus nobody, unde convictus eſt.*

A verdict was however given for the plaintiff, ſubject to the opinion of the court upon this variance, which was argued, was not material; as this warrant is, the defendant would have been puniſhable if he had levied this money of *U*'s effects, provided he had had any in his bailiwick; that the warrant was illegal upon the face of it, to require an officer to levy the money upon *A.* which *B.* has recovered, without ſaying that *B.* has recovered of *A.* If this was ſo, the officer could not be anſwerable for making this return, whether the return be true or falſe. For that would be to puniſh an officer, when he does not execute a writ, which if he did execute, he would be puniſhable likewiſe.

On the other ſide it was argued, that if the name of a ſtranger had been filled up in the blank, he did allow the argument would hold, but as the warrant now is, it could have no other reaſonable conſtruction, but that the money was recovered of *U.* And this caſe was reſembled with another that is well known, of a grant being made between *A.* and *B.* of certain lands; *habendum* to *B.* and his heirs. This grant is clearly good; and yet the lands were not ſaid in the premiſes to be granted to *B.* The Chief Juſtice did allow this caſe; and in the preſent caſe inclined to think that the warrant was good, and would ſupport the declaration. He ſaid, in the preſent caſe, the warrant is not ſet out *in hæc verba* in the declaration, only the ſubſtance of it; and he thought, this might be taken to be the plain ſubſtance and meaning of it. However, the court ordered copies to be given them of the warrant, and likewiſe of the declaration. *Barnard. Rep. K. B.* 364.

Argued, that the plaintiff's evidence had ſupported his declaration. That the warrant in the preſent caſe, was ſuch a one as the bailiff was juſtifiable in executing. *Cro. Jac.* 288. relied on. If this was ſo, the ſingle queſtion would be, whether the plaintiff ought not to have declared upon the warrant according as the form of the warrant was, or whether ſuch a general declaration, as in the preſent caſe, would be ſufficient. That ſuch a general declaration would be ſufficient, and that the evidence does not vary from it, many caſes might be cited. One was, where plaintiff declared upon a note, as indorſee to him or order. Upon evidence, the note appeared to have been indorſed

to

to the plaintiff only, without saying to him or order; and yet it was held, that the evidence maintained the declaration.

Again, upon *oyer*, a bond appeared to have been given to *R.* —— *solvendum eidem R. B.*; and the declaration was of a bond to *Richard B.* yet held to be sufficient. 11 *Mod.* 275. *pl.* 23. So *Mich.* 10 *Geo.* in the case of Lord Viscount *Say* and *Seal*, an indenture was produced in evidence between Lord *Say* and *Seal* of the first part; one *K.* of the second part; and one *J.* of the third part; which witnesseth, that for barring an estate-tail had granted to *K.* without saying who had granted, to the intent, that *J.* should bring a writ of *entry* against him. The question there was, whether the name of Lord *Say* and *Seal* should be supplied, and held it might. 10 *Mod.* 45. 2 *Ventr.* 142. where a bill was produced at a trial at bar, witnessing that a certain parcel of land was devised to *A.* and his issue; and another parcel of lands to *B.* and his issue; and in case they died without issue, then to another. The court ordered their officer in that case to read it, and he read it without issue; and held good. Accordingly they said, that in the present case, the blank in the warrant should be supplied, or the word *versus* rejected, as being insensible; and therefore they hoped, the evidence well supported the declaration. The court said, that this is a matter of some difficulty; and therefore it was adjourned for farther consideration. *Ibid.* 418. 2 *Stra.* 909.

On error brought by the sheriff, on a judgment against him on a writ of *scire fac'*, for an ill return of a *fieri fac'*. 2 *Saund.* 341.

The plaintiff shewed, that the sheriff returned, that his officers had by his warrant seized goods to the value of 160 *l.* and that they were rescued out of their custody, so that he could not levy the debt; and that the said *S.* had no other goods whereupon to levy it, and then the plaintiffs suggest, that the 160 *l.* were not paid to them.

Defendant demurred. *Judgment for the plaintiff* And the defendant brought error, that such *scire fac'* did not lie, but rather debt; and also that the sheriff was not chargeable upon a *scire fac'*, if he did not return, that he had the money in his hands. *Sed non allocatur.* For the plaintiff upon such return, could not sue out a new execution, unless for the surplus, and there could be no *venditioni exponas*; and therefore the plaintiffs ought to have debt or a *scire fac'*, or otherwise they are without remedy, and that by the seizure the sheriff had property, and might receive the goods though out of his office. And judgment was affirmed.

If a *capias* issues against *J. S.* and the sheriff doth not make any return upon the said writ, he is a trespasser *ab initio*, and false imprisonment lies against him. *Compl. Sher.* 174.

Before

Before *ſtat.* 13 *Edw. ſt.* 1. *c.* 19. regularly, for not returning a writ, the ſheriff was amerced *quouſque, &c.* but for a falſe return, or embeziling the writ, action lay at common law. 2 *Inſt.* 151. This ſtatute prevents the return of a *tarde, i. e. quod breve adeo tarde venit, quod præceptum regis exequi non potuit.*

It is a queſtion if action on the caſe lies againſt a ſheriff for not returning a *cap' utlegat'.* It ſeems it does; for the party has loſs by not returning the writ, though the queen may amerce him for his contempt. *Cro. El.* 873.

Action on the caſe lies againſt a ſheriff for not returning a ſummons. *Leon.* 146.

If a *capias* be returned out of an inferior court, to an officer of the court to take *J. S.* and he took him accordingly, and does not return the proceſs, he is a treſpaſſer *ab initio*, for as much as he is the officer that ought to return it, and he is a ſheriff within his juriſdiction. 2 *Rol. Abr.* 563.

If a *capias* in proceſs be awarded to the ſheriff, and he makes his warrant to a bailiff errant, who is a ſworn and known bailiff within the county, to take him, and he does it accordingly; if the ſheriff does not afterwards return this writ, it ſhall make him a *treſpaſſer ab initio*, becauſe he is but the ſheriff's ſervant; and for this he ought to be ſubject to the wrong done to the party, as his maſter is. But if the bailiff errant, in that caſe, return the body and the warrant to the ſheriff, although the ſheriff doth not return the writ, yet he is excuſed. And if the ſheriff upon ſuch proceſs make ſpecial bailiffs, and they take the party, and the ſheriff doth not return the writ; although there is not any default in the bailiffs, yet they are *treſpaſſers ab in initio*; becauſe they are but ſervants to the ſheriff, and by his appointment; but this ſeems a ſorry reaſon: and I take it *Cro. Car.* 446, 447. is good law. For tho' the ſheriff ought to return his writ, otherwiſe his juſtification in falſe impriſonment is not good; yet it is not ſo with his ſervant, for he has no means to inforce the ſheriff to make return thereof; and if what he does is legal, it ſhall not be made illegal to him by the act or default of another. *Cro. Car.* 446, 447.

On a *capias* in proceſs, if the ſheriff makes his warrant to a bailiff of a *franchiſe* to execute it, who does it accordingly and makes return of the body and warrant to the ſheriff, and the ſheriff after does return the writ, yet this ſhall not make the ſheriff a treſpaſſer *ab initio*; becauſe he had done his duty, and no default is in him, and he is the officer of the franchiſe, and not of the ſheriff. *Compl. Sher.* 176.

The

The court was moved, that the ſheriff may not be admitted to file the return of a writ; becauſe an action on the caſe was depending againſt him for not returning it; becauſe then the action would abate; and it was granted. *Stile* 408.

In a writ of *entry ſur diſſeiſin*, the land lying in the county of *H.* if the plaintiff deliver the writ of ſummons to the ſheriff of *H.* in *London*, and after the ſheriff ſummoned the defendant upon the land, and after doth not return the writ; for which an action on the caſe is brought in *London*, where the writ was delivered to him; and the defendant pleads he did not ſummon him, *&c.* upon which they are at iſſue; this may be tried in *London*. 2 *Rol. Abr.* 807.

On an action on the caſe againſt an under-ſheriff, plaintiff declares, whereas the plaintiff had brought a writ of entry againſt *H. C.* and delivered it to the under-ſheriff to be executed *in forma juris*, and gave him two ſhillings for the executing of it, and that at ſuch a day he cauſed the ſaid *H. C.* to be ſummoned, yet *falſo*, *&c.* he did not return the writ of ſummons at the day of the return. *Cro. El.* 175, 397.

It was moved in arreſt of judgment, for that it is not averred he was under-ſheriff, and continued in his office at the day of the return; for otherwiſe the action lies not againſt him. *But not allowed. Leon.* 146.

It ſhall be intended that he continued in his office, for he was under-ſheriff when the writ was delivered to him; and it is alledged, that he cauſed ſummons to be made, and did not return it at the day, by which it ſhall be intended that the authority was in him. The declaration was, that the ſaid *A.* (defendant) *intendens & machinans ipſum querentem in actione ſua prædict' proſequend' impedire*, *&c* did not return the ſummons, but ſaith not, *tunc exiſten'* under-ſheriff, yet it is good; and if the defendant were not under-ſheriff, the ſame ſhall come in of the other ſide.

If the ſheriff levies goods, and dies before ſatisfaction to the plaintiff, an action of debt will lie againſt his executors. But where the ſheriff is chargeable in his life-time for a ſpecial *tort* or *misfeazance*, there his perſon is only chargeable; and *actio moritur cum perſona*. *Cro. Car.* 539.

At *common law*, when the ſheriff made a falſe return upon a writ, an action might be brought againſt him for this falſity; and in this action the ſheriff's return might be traverſed. *Jenk. Cent.* 143 *pl.* 98. and the reaſon why an averment did not lie againſt the ſheriff's return at common law is, that he is a ſworn officer to whom the law gives credit. *Iq. Ib.*

On error, becauſe the defendant was not ſummoned in a *præcipe quod reddat* at the church door, according to the *ſtat.* 31 *Eliz*, *c.* 3. and by reaſon of the default a *grand cape* was awarded, and the ſheriff returned him ſummoned at the church door.

*By the court*—He ſhall not have this averment, but his action of *deceit* againſt the ſheriff *Cro. Eliz.* 9, 10, 371. *pl.* 14, 397. *Mo.* 349. *pl.* 467. *Goldſh.* 128. *pl.* 22.

If in partition the ſheriff return, he was there in proper perſon, and this return be received, and the writ filed, then the court cannot examine it; for the return is good, and the party can have no averment againſt the return, nor error. The jury appeared on a trial, and the defendent would have challenged the array *ore tenus*, becauſe it was returnd by one *S.* ——— ſheriff two days after he had received a writ of *diſcharge*. *By the court*—He cannot challenge it for that cauſe; becauſe it would be a direct averment againſt the record, for it was returned by him as ſheriff, and the return accepted. *Cro. Eliz.* 369.

The *King's Bench* would not ſuffer a traverſe to a ſheriff's return, becauſe it is falſe. And in the *Common Bench* it is uſual, and precedents ordered to be ſeached. 19 *Vin. Abr.* 200. *pl.* 28. in notes.

*But the difference is.* And I ſhall ſhew in what caſes one may aver againſt the return of the ſheriff.

A man may aver againſt the return of the ſheriff, if the return be a matter collateral.

If the ſheriff on a *capias* return a *reſcous*, there may be an averment againſt it. *Owen* 132.

An averment may be againſt the return of the ſheriff, though not in the ſame action; for a falſe return. *Winch* 100.

If the return of the ſheriff concern my inheritance, I ſhall have averment againſt it. 2 *Rol. Rep.* 54.

In a *præcipe quod reddat*, at the ſummons returned, he may ſay that his name is *T. B.* and that he was ſummoned by the name of *J. B.* becauſe otherwiſe he ſhall loſe his land by default. 19 *H.* 6. 10. *b.*

If the ſheriff return a man outlawed of felony, he may aver againſt this return, that he came in at the *fifth county*, and tendered ſureties, and ſo was outlawed; for this is in caſe of life and

member. 1 *Ed.* 3. 24. *b.* *Jenk. Cent.* 122. *pl.* 47. *Dy.* 223. This caſe was denied to be law. 12 *Mod.* 424.

On *ſcire fac'* againſt the tertenants, the defendant, after the return of the ſheriff, pleads, that he is not tenant. The plaintiff demurs, becauſe, as *Cro. Eliz.* 872. he is eſtopped by the ſheriff's return. And in *Raſtal's Entries*, tertenancy is traverſed as to reſcue. And *Cro. El.* 859. it agreed, that waſte is traverſable on the return of the ſheriff. *Per cur'*—A general *non-tenure* by leſſee for years is pleadable; for elſe his poſſeſſion would be diſturbed by *ejectment*. *Cro. El.* 872. *Co. Ent.* 620, 622, 3, 4. *Cro. El.* 859. 3 *Keb. Rep.* 170. *pl.* 6.

In ſome caſes one may plead and aver againſt the return of the ſheriff, as to a *ſcire facias* that there were other tertenants not named, for he is not omniſcient. And though the ſheriff return that ſuch are tertenants, yet that ſhall not conclude the defendant, but that he may ſay another is tertenant of parcel, who is not warned. But *Rol.* is expreſs, that *non-tenure* cannot be pleaded in error againſt the return of the ſheriff, *Keb. Rep.* 55. *Cro. Jac.* 50. 2 *Rol. Rep.* 202.

In a writ of *waſte*, if the officer return, that the jury had the view; yet if the contrary appear by examination at the trial, the return ſhall not conclude any of the parties. 2 *Saund.* 255.

A man may not aver contrary to the ſheriff's return; yet he may ſay, he who had indorſed his name on the back ſide of the writ was not ſheriff; becauſe, by the *common law*, until the ſtatute of *Ed.* 2. *c.* no ſheriff or officer uſed to put their names to the returns; and this averment, that he that made the return is no true officer, is not taken away by the ſtatute. *Yelv.* 34.

If bailiffs of franchiſes that have returns of writs, make a falſe return, the party ſhall have averment againſt it, as well of too little iſſues as of other things, as well as he ſhall have againſt the ſheriff; but all the puniſhment ſhall be againſt the bailiffs.

The ſheriff returns a *reſcous* on a meſne proceſs to a writ of *privilege*, and attachment awarded *niſi cauſa*. The prothonotaries affirmed, that the parties might traverſe the return; but the whole court was of opinion to the contrary. *T. J.* 39.

On motion to traverſe a ſheriff's return of a reſcue, denied by *Holt* C. J. who ſaid he had indeed known it allowed in one caſe; but there are many authorities, and the conſtant practice to the contrary. *Comb.* 295.

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The distinction herein laid down in variety of books and cases is, that on a rescue of mesne process, the sheriff may return the rescue, and is subject to no action; for that on a mesne process he was not obliged to raise the *posse commitatus*, nor would it be convenient so to do on the execution of every mesne process. *Cro. Eliz.* 868. *March.* 1. *W. Jo.* 201. 3 *Bulst.* 198. *Rol. Rep.* 389. *Mo.* 852. 2 *Lev.* 144. 6 *Mod.* 141. *Lutw.* 130, 131.

If the sheriff takes a man on an execution, as on a *capias ad satisfaciend'*, and he is rescued from him before he can bring him to prison, though he returns the rescue, yet this shall not excuse him; for when judgment is passed, and he and his bail do not surrender him, nor pay the condemnation money, and then a *capias* issues, to which there can be no bail, there it is presumed that the will not be forthcoming, because neither he nor his bail have satisfied the judgment, and therefore the sheriff ought to take the *posse comitatus*; and consequently it cannot be a good return, that he took the body, but that it was rescued; and the party may have an action of escape against the sheriff on this return; and this is provided by *stat.* 13 *Ed. st.* 1. *cap.* 39. which was made to prevent sheriffs from returning rescuers to the King's writs. *Cro. Jac.* 419. *Rol. Rep.* 388, 440. 3 *Bulst.* 198. *Mo.* 852.

In an action on the case against the sheriff for an escape on *mesne process*, the defendant pleaded a rescue, which on demurrer was held a good plea, though he did not shew that the rescue was returned. 3 *Lev.* 46.

If one taken on *mesne process* be once in prison, the sheriff cannot return a rescous, for the law presumes that he hath power to keep him there. *Rol. Rep.* 441. 3 *Bulst.* 198. *Cro. Jac.* 419.

If a felon be attaint, and in carrying him to execution he is rescued from the sheriff, the sheriff is punishable notwithstanding the rescue; for there is judgment given, and the sheriff should have taken sufficient power with him; and therefore in that case the townships is not finable. *H. H. P. C.* 602. and it is there said that a rescue is no excuse in felony.

It hath been adjudged, that the return of a rescue by a sheriff must shew the year and day on which it was made, such return being in lieu of an indictment. 3 *H.* 7. 11. *pl.* 3. *Bro. Abr.* tit. *Return de brief*, 97. *Fitz. Ar.* tit. *Coro.* 45. *Attach.* 1.

It has been held, that the sheriff's return of a rescue on a *latitat*, without mentioning the day of the caption, was sufficient; all the clerks in court affirming the precedents to have been so. *Palm.* 532.

The ſheriff's return of a reſcue, without mentioning the place where it was made, was held naught, and the party diſcharged. *Mo.* 422. *pl.* 585.

On a *latitat* awarded againſt *J. S.* the ſheriff returned a reſcous on ſuch a day, but did not mention any place where the reſcous was made; and adjudged a void return, becauſe it doth not appear that either the arreſt or reſcous were within his juriſdiction; but if it had appeared to have been done in the county, it ſhould be intended within his bailiwick though it was within a liberty in the ſame county; and even in ſuch caſe the reſcous had been lawful; becauſe the arreſt was good, nobody being prejudiced thereby but the lord of the liberty. *Yelv.* 51.

Where the return of a reſcous recited that a *latitat* was directed to him, *&c.* and that he made his warrant to his bailiffs, who arreſted *A.* and that he was reſcued by *J. S.* this was held good, though it did not ſhew the time or place where the reſcue was made. 2 *Rol. Rep.* 255.

On reading the ſheriff's return of a reſcous, theſe exceptions were taken to it; *firſt*, it is ſaid, *feci warrantum meum T. T.* and does not ſay, that *T. T.* was his bailiff. *Secondly*, he does not ſay for what cauſe he made his warrant, and ſo it appears not whether it was lawful or not; and on theſe exceptions it was quaſhed. *Stil. Rep.* 155.

An exception was taken to a ſheriff's return of a reſcue, that it was not alledged that the party was in cuſtody, it being only by implication that he was reſcued out of the bailiff's cuſtody; and for this it was quaſhed; ſo that it was not returned who reſcued, or that the party reſcued himſelf. *Sid.* 332. *Lev.* 214.

The ſheriff returned a reſcous on a ſpecial bailiff, *viz.* that *C.* and ſeven others made an aſſault on the bailiff, *&c.* and the party arreſted *cepit & abduxit*, when it ought to have been *ceperunt et abduxerunt*; and the court held the return good as to *C.* but void as to the others; and he was admitted to make his fine by attorney, which was 6*s.* 8*d.*. *Lit. Rep.* 2.

A reſcue of a perſon arreſted on *meſne proceſs* was returned againſt divers particularly named, and the return was, that they *reſcuſſerunt*, without ſaying *et quilibet eorum reſcuſſit*; and held well enough, it being in the *affirmative*. *Vent.* 2. 2 *Keb. Rep.* 436.

Exceptions were taken to the return that it was *feci warrant'*, without ſaying, *ſub ſigillo officii*, but over ruled; for it cannot be

a

a warrant unless it be under seal, and the saying, *feci warrant' direct'*, implies it was so. *T. Jon.* 197.

The sheriff returned a rescous thus; *first, non est inventus in ball' mea* and *executio residui brevis patet in schedula huic brevi annex'*, and that was of a taking and rescous; and the return of the rescous was quashed for the repugnancy; *per cur.*—After *non est inventus*, all the rest is idle, and there remains no more for the sheriff to do.

*Note.* On the return of a rescous the sheriff always concludes, that after the rescous made the defendant *non est invent. in balliva.* 6 *Mod.* 220.

The return of a rescue was, that the party was in custody of three of the bailiffs, and that the defendants *insultum fecerunt* upon one, which the sheriff called *ballivos meos*; and for that reason it was quashed. 5 *Mod.* 218.

It has been a great question, and much debated in variety of cases, whether on a rescue of a person out of the custody of a sheriff's bailiff, the sheriff is to return the rescue *secundum veritatem facti*, or *secundum veritatem in lege*, that is, that he was rescued out of the custody of the bailiff, being the truth in fact, or out of his own custody, being the truth in law; the bailiff's custody being in law the custody of the sheriff himself; and it seems now agreed, that a return either way is good; and herein some books distinguish between a bailiff of a liberty and a common bailiff, and say that the return of a rescue out of the custody of a bailiff of a liberty, ought to be so expressed, because he is such a public officer of whom the court takes notice. Others distinguish between an action on the case and an indictment for a rescous; for that in the first, the plaintiff must declare as the truth is, *viz.* that he was rescued being in the custody of the bailiff, but that in an indictment it must be according to the opperation it hath in law. *Palm.* 532. *T. Jon.* 197. *Cro. Eliz.* 780. *Lev.* 214. 2 *Lev.* 28. *T. Raym.* 161. 4 *Mod.* 293. 5 *Mod.* 217. *Sid.* 332. *Stil. Rep.* 417.

On a motion to quash the return of a rescue, which was, *virtute brevis mihi directi feci* a warrant to *J. S.* and *J. N.* my bailiffs, who by virtue thereof *ceperunt et arrestaverunt* the defendant, *et in custodia mea habuerunt, quousque* A. and *B. rescusserunt* the defendant *ex custodia* J. S. *et* J. N. *ballivorum meorum*; and it was quashed. *Holt* Chief Justice, The sheriff should either have returned, that the defendant was in his custody, and rescued out of his custody, or that he was in custody of the bailiffs and rescued out of their custody, either of which

which returns had been good. But this return is repugnant, *viz.* that the defendant was in cuſtody of the ſheriff, and reſcued out of the cuſtody of the bailiffs. Ld. *Raym.* 589. 2 *Salk.* 586.

A return of a reſcue, and four exceptions taken to it.

*Firſt*, That it is ſaid the bailiff by virtue of the warrant took the defendants, and arreſted them, when by law it is the arreſt of the ſheriff; but it was over ruled.

*Second*; Not ſaid that the defendants, who were man and wife, were in the poſſeſſion of the bailiff; but ſaid only, that the bailiff took and arreſted them, and being ſo arreſted, and being in my cuſtody, they were reſcued out of my cuſtody; this was held well *per cur'*, for that *exiſtentes in cuſtodia* was an *affirmance*.

*Third*; Objected, that in the return it is ſaid that *P.* and *M.* his wife *non ſunt inventi in balliva mea*, but do not ſay, *quod uterque eorū' non eſt invent'*; and for this cauſe the return was quaſhed; for tho' it was urged that this part of the return did not concern the party injured, who was the plaintiff, *per cur'*—We muſt judge upon the whole return, and this is an excuſe returned why he did not execute this writ; and the excuſe is not compleat, for he might not be able to find the wife, and yet might find the huſband, and the difference is between an affirmative and a negative in the nature of the thing; if you affirm of many you affirm of each, but it is the contrary in negatives.

*Fourth*; That it is not ſaid *vi & armis* they reſcued, but only *vi & armis* to the aſſault; and for this I held the return naught, *ſilentibus* the reſt of the court. To ſupport the firſt reſolution, the caſe of *the King* and *M. C.* was quoted, which confirmed my opinion alſo as to the *Vi & armis*. *Forteſ. Rep.* 362.

It ſeems that antiently, when the ſheriff returned a reſcue, the party was admitted to it as to an indictment; but the courſe of late has been, not to admit any plea to it, but drive the party to his action againſt the ſheriff in caſe the return was falſe; and hence it is now ſettled that the return of a reſcue is not traverſable; but yet it hath been held, that the ſubmiſſion to the fine doth not conclude the party grieved from bringing his action for the falſe return, if it were ſo. *Cro. Eliz.* 781. *Dy.* 212. *T. Jo.* 39. *Ventr.* 224. 2 *Ventr.* 175. *Comb.* 295. *Suppl. to Lil. Abr.* 33. *Barnes* 307.

The ſheriff on a *capias* returned, that he arreſted the defendant at *S.* and would have carried him to the gaol, and *A. B.* reſcued him. This return was inſufficient, becauſe he did not ſhew at what place

place *A. B.* made the reſcue; for it ſhould not be intended the place where the arreſt was. *Bro. Abr.* tit. *Retorn de brief, pl.* 97. *Id.* tit. *Lieu. pl.* 57. *Dy.* 69. *pl.* 29. *Mo.* 422. *pl.* 585. *Palm.* 563.

On a *latitat* awarded againſt *W.* the ſheriff returned a reſcous on ſuch a day, but mentioned no place where the reſcous was; and adjudged void, becauſe *non conſtat*, whether the arreſt and reſcous were within his county and juriſdiction; but if it had *appeared to be done in the county*, though he does *not ſay (infra ballivam meam)* it ſhall be intended within his bailiwick, though it was within a liberty in the ſame county; and even in ſuch caſe the reſcous had been unlawful; becauſe the arreſt was good, and no offence, unleſs to the lord of the liberty. *Yelv.* 51, 52. cites 11 *H.* 4. 2. 14 *H.* 6. *Quare impedit. Jenk.* 125. *pl.* 53. *S. P.* that the return is void; becauſe it cannot be traverſed for want of a place, out of which the jury ſhall come.

The defendant pleads *plene adminiſtravit*, and verdict is for the plaintiff. This eſtops the ſheriff of the county where the trial was, to return *nulla bona*, for he is concluded by the verdict to make any return contrary to it; but the ſheriff of another county ſhall not be ſo concluded, but the ſheriff of the county where the writ is brought ought to return a *devaſtavit*, and thereupon the plaintiff ſhall have proceſs into another county. 2 *Leon. pl.* 90. *Anderſ.* 32.

And the queſtion further was, if a *teſtatum* ſhall iſſue into another county, before the ſheriff of the county where the writ was brought had returned a *devaſtavit*, and not reſolved; but without doubt it is the ſafer way to do it upon the return.

The principal caſe was, debt in *London* againſt an executor; upon *plene adminiſtravit* it was found for the plaintiff. The plaintiff aſſigned the ſame to the *Queen*, and a *ſcire fac'* iſſued out of the *Exchequer* againſt the defendant, *&c.* into the county of *D.* and the ſheriff returned *nulla bona*, *&c.* which was not good, *cauſa qua ſupra*, though the debt was well aſſigned. And upon a *conſtat* of goods in another county, he may well have a *ſcire fac'* into another county. 2 *Leon. pl.* 90. *Bendl.* 23.

Where executors plead *plene adminiſtrav'*, it was found they had aſſets, and a *fieri fac'* iſſued to the ſheriff, who returned that they had not any thing within the county. *Per cur'*—It is a good return, becauſe the jury, it may be, found aſſets in another county; ſo the verdict ſhall not bind the ſheriff. 2 *Brownl. Rep.* 116.

If it appear by the defendant's plea that he has aſſets in his hands, and if the ſheriff cannot levy the debt in the defendant's hands, he may upon the defendant's own ſhewing (without any damage) return

a *devaſtavit*; and if judgment be given againſt an executor on demurrer, and execution awarded, the ſheriff cannot return *nulla habet bona teſtatoris*. But it is a *devaſtavit* if it be found againſt the executor by verdict. *Cro. Eliz.* 102.

A judgment was given *de bonis teſtatoris*, and *fieri fac'* iſſues out; the ſheriff returns *nulla bona*; the plaintiff may have a ſpecial *fieri fac'*, that the ſheriff ſhall levy the debt of the goods of the dead, and *ſi ſibi conſtare poterit*, that the executors have waſted them, then *de bonis propriis*; and if the ſheriff makes a falſe return, the party may have an action on the caſe. If on the return of *nulla bona*, and a *quia teſtatum eſt*, that they have waſted, a writ of inquiry is awarded what goods were waſted; and it is found that goods *ad valentiam* of the debt were waſted; and upon that *ſcire fac'* to have execution *de bonis propriis* upon two *nichils* returned; this is erroneous, and if the inquiſition be falſe, the party hath no remedy; and upon two *nichils* returned, the defendant ſhall be condemned; yet perhaps he had not notice. 5 *Co.* 32.

To that purpoſe is a caſe in *Lit. Rep.* Judgment was given againſt the executor, and execution awarded; and the plaintiff informs the ſheriff, that the executors have waſted the goods of the teſtator; but the ſheriff would not return a *devaſtavit*. *Hendon* ſerjeant moved for a commiſſion to inquire whether the goods were waſted; and if it be found, then the ſheriff might return a *devaſtavit* without peril. But the judges ſaid, they would not adviſe, becauſe it was a new practice. *Lit. Rep.* 47.

In *Alworth* and *Peel*'s caſe it was reſolved. There debt was brought againſt *P.* as executor, the plaintiff had judgment to recover *de bonis teſtatoris*; and thereupon a *ſcire fac'* was awarded, and the ſheriff returns, *quod nulla habuit de bonis teſtatoris*; and the plaintiff ſurmiſes, that he had waſted the teſtator's goods, whereupon he prayed a *ſcire fac'* why he ſhould not have execution *de bonis propriis*. *Per cur'*—This writ ſhall not be awarded upon the ſurmiſe of the party of a devaſtation, nor in any caſe where the judgment is *de bonis propriis*, unleſs it be on return of the ſheriff, where he returns a *devaſtavit*. *Cro. Eliz.* 530.

If *A.* recovers againſt *B.* debt and damages, and after *B.* died, and adminiſtration is granted to *C.* his wife, who waſtes the goods, and after takes *D.* to huſband, and a *fieri fac'* is awarded *de bonis teſtatoris* in the hands of *D.* and *C.* and the ſheriff returns *nulla bona*, &c. and upon this, on ſurmiſe that they have waſted the goods, another writ was awarded to the ſheriff, *ſi ſibi conſtare poterit per inquiſition'* that they have waſted the goods, then to warn them to ſhew cauſe why

why execution ſhould not be *de bonis propriis*, and ſo an inquiſition is taken. And the ſheriff returned, that they had not in their hands any of the goods of the inteſtate; but that the *feme*, being adminiſtratrix of her firſt huſband, had goods of the value of 100 *l.* of the ſaid inteſtate's, and had waſted them during her widowhood, and the huſband had not waſted any of them. *Et ſi devaſtaverunt*, according to the writ, the jury pray the direction of the court. *Per cur'*—This ſpecial return of the ſheriff is good, and by this the huſband is to be charged for the converſion of the wife. *Cro. Car.* 600.

The ſheriff returns a *devaſtavit* (no aſſets over being in queſtion) on *non eſt factum* pleaded againſt an adminiſtrator by *fieri fac'* with a *ſcire fac'*. *Per cur'*—Though it be a falſe return, we cannot help it, but it is at the ſheriff's peril. 3 *Keb. Rep.* 530. *pl.* 20.

On *fieri fac'* with a *ſcire fac'*, and aſſets, the ſheriff returned waſte; and the defendant pleaded *plene adminiſtravit*. The plaintiff demurred, becauſe the point of the inquiſition is not traverſed; and judgment *for the plaintiff*.

In debt againſt an executor, and a recovery by verdict, and judgment upon this, and a *fieri fac' de bonis* of the inteſtate; upon which a *devaſtavit* was returned, an *elegit* iſſues *de bonis propriis*. Mo. 299. pl. 446.

If *A.* recover againſt *B.* and execution *de bonis teſtatoris, ſi non, de bonis propriis*, and the ſheriff upon a *fieri fac'* levies the monies, and after to another *fieri fac'* to whom directed, returns a *devaſtavit*; and upon this a *ſcire fac'* is granted againſt *B.* to ſhew cauſe, *&c.* *B.* may diſcharge himſelf of this *devaſtavit* by plea, that the ſheriff levied the money upon the firſt *fieri fac'*. Rol. Abr. 903.

An action was brought againſt a ſheriff for a falſe return of a *fieri fac.* againſt an adminiſtrator, *de bonis inteſtati*, and on *non cul'*, verdict for the plaintiff; and a caſe was made for the opinion of the court, *viz.*

The plaintiff, being an adminiſtrator, was ſued by *A.* and pending the ſuit, let judgment go againſt him by *B.* but did not plead that judgment in bar of the action, yet ſold the inteſtate's goods to pay *B. A.* recovered judgment, and ſued a *fi. fa.* on which the ſheriff levied part, and as to the reſt returned a *devaſtavit*.

*Argued* for the plaintiff, that the ſuffering judgment by default was no confeſſion of aſſets, and that the ſheriff ought not to have returned a *devaſtavit* on the *fi. fa.* but a *nulla bona*, and that thereupon there ought to have been a *ſcire fieri* inquiry. *Per curiam.*

1. The ſheriff may return a *devaſtavit* on the firſt *fieri fa.* if he will; 'tis at his peril, if falſe, and the inquiry is only for his ſafety.

2. If an executor confeſſes, or ſuffers judgment by his default, he admits aſſets, and is *eſtopped* to ſay the contrary.

3. That he might have pleaded the firſt judgment obtained by *B.* againſt the action of *A. et riens ultra*, but having not done it, he has confeſſed he has aſſets to anſwer the judgment in this as well as the firſt action; and if a *ſcire fac' inquir'* had been awarded on the ſaid judgment, and a *devaſtavit* returned, and *non devaſtavit* pleaded, the adminiſtrator could not have given in evidence the firſt judgment, becauſe he had not pleaded it when he might, ſo no occaſion for an inquiry; nor is he injured by the return of *devaſtavit* on the *fi. fa.* ſince it could not have been avoided, if there had been an inquiry.

4. The adminiſtrator's not pleading the firſt judgment, and *nihil ultra*, when he might, is an admiſſion of aſſets as to the ſecond judgment, ſo that he has ſlipped his time, and he is *eſtopped*; and ſo are the jury, and their verdict is void, and the ſheriff ſhall take advantage of all eſtoppels between the parties; as if an action be brought againſt a *feme ſole*, and ſhe marries, and judgment is againſt her as ſole, and execution thereon, and the ſheriff takes her by that name, ſhe is eſtopped to ſay the contrary. *Salk.* 310. *pl.* 14. 2 *Ld. Raym.* 589. See *Dy.* 57, 222. 2 *Sid.* 70.

The practice now is more nimble than by the tedious inquiſitions, and that is, by bringing action in the *debet & detinet* againſt an executor, ſuggeſting a *devaſtavit* in his declaration, without any return of the ſheriff. *Sid.* 397.

The ſheriff returns upon inquiſition, that the defendant (adminiſtrator) *habuit bona & catalla in manibus ſuis, quæ fuerunt del inteſtate tempore mortis ſuæ ad valentiam debiti & damnorum* recovered by the original judgment; and that the defendant *bona & catalla illa ad valenc' debiti & damnorum prædict' vendidit & elongavit ac in uſum ſuum proprium convertit & diſpoſuit.* Defendant at the return of the writ comes in, and *proteſtando* that he had fully adminiſtred, for plea he ſaith, *non vendidit ſeu elongavit, &c. et hoc, &c.* Plaintiff replies, that the defendant *vendidit, elongavit, &c.* and found for the plaintiff. *Per cur'*—Tho' this is no apparent iſſue, (but whether *devaſtavit vel non*) for the defendant might pay debts with his proper monies, and that he might diſpoſe of the goods to his own uſe; yet it is good after verdict. For the writ of *ſcire fac'* ſuggeſts, that the defendant *bona & catalla, &c. diſpoſuit ea intentione quod dicta executio non fieret.* Saund. 306. And it is the defendant's own fault to take ſuch an iſſue; for he might have taken iſſue, that he had not goods of that value, or that he had paid any ſpecial debt.

*Of the Venire Facias, Habeas Corpora Juratorum, and Distringas.*

STAT. 8 *H.* 6 *c.* 12. extends to any record, specialty, copy, &c. 2. *Parol.* 3. *Plea.* 4. *Warrant of attorney.* 5. *Writ original and judicial.* 6. *Panel.* 7. *Return.* But by it misprision of clerks are only amendable; but it extends not to an insufficient trial, where the *venue* is mistaken. It exends not to a return of a sheriff, where it should be by a coroner. Nor to a trial by one not returned in the *venire fac'*. Nor to a return of a *venire fac'* without the name of the sheriff. Now these misprisions are not remedied by 8 *H.* 6. *c.* 12. 32 *H.* 8. *c.* 30. nor 18 *Eliz. c.* 14. *(viz.)* where the return is by the sheriff, where it ought to be by the coroner; when the sheriff does not put his name to the return of the jury; when no return is on the *venire fac'*; nor when one gives a verdict, who is not returned; nor to insufficient trials, where the *venue* is mistaken. 8 *Co.* 156.

*After verdict, judgment shall not be arrested, for that the* venire fac', hab. corpora, *or* distringas, *was awarded to a wrong officer, upon any insufficient suggestion, or that the* venue *was in some part misawarded, or issued out of more or fewer places than it ought to be, so as some one place be right named.* Or for misnaming any of the jurors, either in the surname, or any addition in any of the writs or returns thereof, so as *constat. de persona.* Or for a want of return of any of the said writs, so as a panel be returned and annexed thereunto. Or for that the officer's name is not set to the return. *Stat.* 21 *Jac. c.* 13.

No statutes of *jeofails* extend to appeals or pleas of the crown; nor to actions or informations on penal laws, except in 17 *Car.* 2. *c.* 8. other than concerning customs, subsidies of tonage and poundage, to which it extends not. *Stat.* 21. *Jac.* helps not, if the christian name of a juror be mistaken, and the law notwithstanding. 5 *Co.* 41, 42. and *Cro. Jac.* 458. remains as it was. See 2 *Vin. Abr.* 292. *pl.* 5.

But it is amendable by *stat.* 18 *Eliz.* as a discontinuance of process, as *Teppet* on the *Venire*, and *Teppet* on the *distringas*, was amended. So *Samuel* in the *venire*, and *Daniel* in the *Nomina Jurator.*

If there be no *venue*, it is aided by 16 & 17 *Car.* 2. after a verdict, if the cause be tried in the proper county where the action is laid. 2 *Saund.* 227.

By *ſtat.* 4 *Ann. c.* 16. all the ſtatutes of *jeofails* ſhall be extended to judgments by confeſſion, *nil dicit*, or *non jum informatus*, in any court of record, and no ſuch judgment ſhall be reverſed, nor any writ of inquiry of damages executed thereon, be ſtayed or reverſed, for or by reaſon of any imperfection, omiſſion, defect, matter or thing whatſoever, which would have been aided and cured by any of the ſaid ſtatutes of *jeofails*, in caſe a verdict of 12 men had been given in the ſaid action or ſuit, ſo as there be an original writ or bill, and warrants of attorney duly filed according to the law as it is now uſed, &c.

And whereas great delays do frequently happen in trials, by reaſon of the challenges to the arrays of the panels of jurors, and to the polls, for default of hundredors; for prevention whereof, 'tis enacted, "That every *venire facias* for the trial of any iſſue, in any action or ſuit in any of her Majeſty's courts of record at *Weſtminſter*, ſhall be awarded of the body of the proper county where ſuch iſſue is triable." *Stat.* 24 *Geo.* 2. *c.* 18 *ſect* 3.

But *ſtat.* 4 *Ann.* does not to extend to appeals, indictments, preſentments; or to any writ, bill, action or information, upon any penal ſtatute.

Yet this act, and all the ſtatutes of *jeofails*, do extend to all ſuits in any of the courts of record at *Weſtminſter*, for recovery of any debt immediately owing, or any revenue belonging to her Majeſty, her heirs or ſucceſſors; and ſhall alſo extend to all courts of record in the counties palatine of *Lancaſter*, *Cheſter*, *Durham*, and the principality of *Wales*, and to all other courts of record within this kingdom.

Jurors to ſerve upon the *Tales*, ſhall be freeholders or copyholders of the county, and returned upon ſome other panel to ſerve at the ſaid aſſizes, and attending in court, and may be challenged by plaintiff or defendant. Demandant or tenant, as if they had been impanelled upon a *venire facias*, to try the iſſue. *Stat.* 7 & 8 *W.* 3. *c.* 32. 63.

By *ſtat.* 4 *Ann. c.* 16. *ſect.* 8. when a view of meſſuages, lands or places in queſtion, ſhall be thought neceſſary by the court, for the jurors better underſtanding the evidences that will be given upon the trials of ſuch iſſues, in every ſuch caſe the reſpective courts in which ſuch actions ſhall be depending, may order ſpecial writs of *diſtringas* or *habeas corpora*, to iſſue. By which the ſheriff, or ſuch other officer to whom the ſaid writs ſhall be directed, ſhall be commanded to have ſix out of the firſt twelve of the jurors named in ſuch writs, or ſome greater number of them at the place in queſtion, ſome convenient time before the trial, who then and there ſhall have the matters

matters in queſtion ſhewn to them by two perſons in the ſaid writs named, to be appointed by the court; and the ſaid ſheriff, or other officer who is to execute the ſaid writs, ſhall, by a ſpecial return upon the ſame, certify that the view hath been had according to the command of the ſaid writ.

The *venire* ought to be delivered to the ſheriff *four days* before the return of it, if the jury dwells forty miles off; and *eight days* if they dwell farther from the place where the trial is to be.

The name of the ſheriff to the *diſtringas* and *tales*, are of neceſſity, and to the return of the *habeas corpora*, by the ſtatute of *York* 12 *Ed.* 2. *c.* 5. and theſe are not aided by any of the ſtatutes of *jeofails*. *Cro. Eliz.* 310. *Cro. Jac.* 188. *Cro. Eliz.* 482, 509.

Inſufficient returns are aided by the ſtatute of *Jeofails*; as upon the return of the *venire fac'* there wanted theſe words, *quilibet juratr' per plegios*. This is not as if there was no return at all. And *cur'*—It is an inſufficient return which is aided, and it was awarded to be amended; for the omiſſion of pledges is but matter of form, and not like where there was a want of an original. And ſo in 2 *Rol. Rep.* 87. the ſheriff returns a *venire fac'* (viz.) *executio iſtius brevis*, &c. and the panel of the jurors is filed to it; but under the names of the jurors he omitted to file the pledges. *Cro. Jac.* 2 *Rol. Rep.* 87.

In the writ of *venire fac'* awarded to the ſheriff of *Somerſet*, the word *(vicecomiti)* was omitted; yet he returned the panel, and his name was indorſed. *Per cur'*—It is error; but becauſe upon the roll it was *vic' Somerſet*, it was amended. *Cro. Car.* 595.

*Venire fac'* was *album breve*, (i. e.) no name of the ſheriff was indorſed. It was denied to be amended. *Brownl.* 43.

The return of a *venire* by one ſheriff of *London*, is ill, and not helped by the ſtatute 21 *Jac.* But a *certiorari coronatoribus*, where there is but one, is well enough. *Keb. Rep.* 867. *pl.* 14. *Sid.* 243. *pl.* 5. *Keb. Rep.* 900. *pl.* 71. 901. *pl.* 75.

A *Venire facias* was awarded in the time of Queen *Elizabeth*, and a *diſtringas* with *niſi prius* in the time of King *James*, reciting *quod diſtringas juratores nuper ſummonit' in curia noſtra*, whereas in truth there had not been any ſummons *in curia* of the King, but of the Queen only, and trial and judgment thereupon; and it was reverſed for this error; for this *diſtringas* with *niſi prius* is a ſpecial authority to the juſtices, who being juſtices by the ſpecial commiſſion, and not having authority to take any jury but ſuch as was ſummoned *in curia regis*, there being none ſuch, the trial by the jury was erroneous. *Cro. Jac.*

161. But in the principal caſe, which was error of a judgment in *Durham*, ſuch caſe was amended; becauſe the juſtices of *Durham* are original judges of the whole record, and had the record before them at the time of the trial, and the writ being variant, might be amended there. *Cro. Jac.* 161.

The *venire* was between *Heath* and *J. T.* and the ſheriff returned it to be between *Heath* and *W. T.* This was a miſ-trial, and judgment ſhall not be for the plaintiff. *Winch.* 73.

*Venire fac'* bears *teſte* on a *Sunday*; it was amended after trial. 6 *Mod.* 286.

A *venire fac'* bore *teſte* out of term, and made to accord with the roll; and a *diſtringas* was amended a long time after the trial; yet the roll being good, it was amended. *Cro. Jac.* 161.

*Venire* awarded *vicecomitibus*, Lond' *præcipimus ſibi*, was amended after verdict. So if after the *habeas ibi hoc breve*, if the *nomina juratorum* be left out. *Cro. Eliz.* 543.

In the award of a *venire fac'* ſuper *quo preceptum fuit vicecomiti com'*, *&c.* it is error; it ought to have been *præceptum eſt.* 2 *Saund.* 393.

The *niſi prius* roll is, that challenge being made to the ſheriff after iſſue, and confeſſed, a *venire fac'* was awarded to the *coroners*; but the roll of *niſi prius* was, that the *venire fac'* was awarded to the ſheriff. *Per cur'*—This roll of *niſi prius* being a miſpriſion, and which ought to be warranted by the record, ought to be amended. *Cro. Jac.* 353. *Winch. Rep.* 73.

If the ſheriff return that there are no freeholders of the *viſne*, or if the *viſne* be where the King's writ runs not; as in the *cinque ports*, *&c.* or in a place where the men are privileged from ſerving on juries out of that place, as the iſland of *Ely*, *&c.* the plaintiff may pray a *venire fac'* of the *viſne* next adjoining; and if the *viſne* be in *Wales*, (where the King's writ runs not) the *venire fac'* ſhall be directed to the ſheriff of the next *Engliſh* county, to cauſe the jury to come *de propinquiore viſne* of his county to the *viſne* in *Wales* adjoining; for the court ſhall not be ouſted of the plea.

If the words *(quorum quilibet habeat)* be left out, or *duodecim*, or *qui nulla affinitate attingunt*; theſe are amendable, as miſtakes of the clerks.

*Venire fac'* was in this manner; *Jacob'*, &c. *vicecomiti ſalutem*, and ſaith not of what county, it was amended. *Cro. Jac.* 78.

*Venire*

*Venire fac'* was returnable *coram majore & ballivis de Exeter*, without saying *in curia vel hic.* It is error, becauſe it may be returned in a tavern. *Sid.* 77.

If a *venire fac'* be quaſhed for conſanguinity to the ſheriff, a *venire fac' de novo* ſhall be granted to the coroners. 2 *Rol. Abr.* 720.

The awarding of a new *venire fac'* to the ſheriff, where the *venire fac'* was quaſhed for favour in the under-ſheriff, is not error. *Rol. Rep.* 272.

A *venire fac'* is to the coroners without any ſuggeſtion at all of any challenge to the ſheriff. This is not aided by *ſtat.* 21 *Jac. c.* 13. nor by the 16 & 17 *Car.* 2. *c.* 8. and the court cannot amend this direction of proceſs to a wrong officer; nor can the court examine the truth without a ſuggeſtion. And judgment was arreſted. 3 *Keb. Rep.* 624. *pl.* 4.

A *Venire* awarded to the coroners, and *tales* to the ſheriff is erroneous. *Cro. Eliz.* 574.

If a *venire fac'* be directed to the coroners, all the coroners ought to join in the return; and ſo both the ſheriffs of *London* ought to join, or elſe the return is not good. *Hob.* 97.

Information againſt defendant for a riot in *Cheſter*, which is a county palatine, and therefore to be tried there; and a ſuggeſtion being entered on the roll, that the ſheriff was of affinity with the defendant, the *Venire fac'* iſſued to the other ſheriff only, and a jury returned; and defendant found not guilty, and the record removed thither. And moved in arreſt of judgment, that the *venire* was ill directed, for it ought to have been to the coroners. *Per cur'*—*Holt* delivering it, the *venire* is well, and trial good; and ſo adjudged before between Sir *D. Rich* and Sir *Thomas Player*, where the *venire* was directed to Sir *D. North* only, the other being a party. For the ſheriff is the proper officer to whom the return of writs belongs; and the law does not commit it to others, without default or partialty ſuſpected, and then conſtitutes the coroner; but where there are two ſheriffs, and only one of them ſuſpected of partiality, and for this defect is challenged, his companion is as proper a perſon to ſupply that defect as the coroner. But it is ſaid, both ſheriffs make but one officer, yet every one of them is a ſheriff; the coroners are but one officer, *Mod.* 198. yet if there be two coroners, and one of them be challenged, and if four, and three of them be challenged, the *venire* ſhall go to the other; but if none, it is directed to go to them all; ſo *venire* is not to be directed to the coroners, but on default of ſheriffs. If ſheriff dies, proceſs does not iſſue till another be made, and

ſhall

ſhall not go to the coroners. It is the challenge only makes the coroners or any of them officers; and why may not the challenge as well make the other ſheriff and officer? In a *quare impedit* againſt the archbiſhop of *York*, if he be found diſturber, the writ *de admittenda idonea perſona* goes to the archbiſhop of *Canterbury*; yet he has not ſuperiority, but only precedency. *Dy.* 327. And *venire* well awarded. 12 *Mod.* 22.

The ſheriff need not return the names of all the 24 on the *diſtringas*, *hab' corpora*, or *venire fac'*, nor affix them to the ſaid writs. *Keb. Rep.* 418. *pl.* 131.

And it was agreed *per cur'*, 2 *Rol. Rep.* 111. becauſe the *venire fac'* was good and well returned, the *diſtringas* ſhall be awarded by the ſheriff.

If a *diſtringas ſicut alias* iſſue againſt the jury, and no other *diſtringas* was awarded againſt them before, by which the propoſal of the writ is falſe; yet this is not error, for the *venire fac'* ſerves inſtead of a *diſtringas*. 2 *Rol Rep.* 133.

The panel of the *hab' corpora* was amended upon the ſheriff's oath. And where the *diſtringas* was blank, yet the *venire fac'* was well returned. *Cro. Jac.* 483.

A contrary *diſtringas* is by the ſheriff put to the right *panel*, and tried; the trial was held good, ſo though no *diſtringas* had been; for as this is, there is no writ between the parties. 3 *Bulſtr.* 180.

Upon an information, the *diſtringas* was teſted the day after the return of the *venire facias*, and held not amendable. *Salk.* 51. 6 *Mod.* 164, 268. 2 *Raym.* 1061.

*Tales* not removed by the ſheriff or his deputy, or any ſworn officer, but by a clerk of the court; but by general appointment of the ſheriff it is well enough, and the ſheriff is anſwerable for it. *Keb. Rep.* 357. *pl.* 48. *Sid.* 90. *pl.* 9. *T. Raym.* 240.

*Array* returned by the ſheriff, after his diſcharge, is not good. *Cro. Eliz.* 369.

## OF JURIES.

JURIES to inquire, are grand juries at assizes, or the quarter-sessions. So juries returned before justices of peace, to inquire of riots, forcible entries, and juries returned before commissioners of sewers, coroners, &c. and inquisitions taken before the sheriff; and all these the sheriff is to summon.

Formerly, upon every trial in personal actions, the sheriff was to return two hundredors at least. *Co. Lit.* 135, 158.

The law in that respect is now altered; for by *stat.* 4 *Ann. c.* 16. *s.* 6, 7. and 24 *Geo.* 2. *c.* 18. *s.* 3. it is declared not necessary. *Vide* statutes.

If it be conceived an indifferent jury will not be returned in the country, the court on motion will order the sheriff to attend the secondary of the office, with the book of his freeholders, to have an indifferent one returned. So it was done, because the plaintiff in a former trial between the parties had feasted four of the jury that were returned upon that trial. 2 *Vin. Abr.* 301. *pl.* 1. The like was done in *Coxe*'s case, 15 & 16 *Car.* 2. *B. R.* because *Coxe*, who was entitled to the reversion, had forbid rent to be paid by the tenants, and took on him the defence of the *ejectment* brought against the tenants, was of kindred to the sheriff and under-sheriff, and trustee for them. But in another case, 17 *Car.* 2. *B. R.* the court, on certificate of a judge, that a verdict was given contrary to evidence, would not allow that the sheriff should bring in the book of freeholders to the secondary for the ill example; but ordered the sheriff should return a good jury in the new trial.

A rule was made, that *when the master struck* a jury, *viz.* 48 out of the freeholders book, *he should give notice to the attornies* of both sides to be present; and if the one came, and the other did not, he who appeared should, according to the ancient course, strike out twelve, and the *master should strike out* the other twelve *for him that was absent.* Salk. 405. pl. 1.

In such case the jury shall be struck *ex parte*, and the secondary shall strike twelve for him that does not attend. 12 *Mod.* 94.

On motion that the cause to be tried at the bar was of great consequence, the court made a rule for the sheriff to return 48 jurors upon the jury. 2 *Lil. Abr.* 155.

If by rule of court the master is ordered to *strike a jury*, in case it be *not expressed* in such rule, *that the master shall strike* forty-eight, *and*

*each of the parties ſhall ſtrike out* twelve, the maſter is to ſtrike twenty four, and the parties have no liberty to ſtrike out any. *Salk.* 405. *pl.* 2

When a trial is to be for a thing which concerns the under-ſheriff, there the high-ſheriff ſhall return the jury; if the trial concerns the high-ſheriff, the under-ſheriff ſhall not return the jury, but the coroners. 2 *Lil. Abr.* 155.

The attorney general moved for leave to amend an *information* againſt a defendant, wherein the name of a commiſſioner of exciſe was miſtaken; and granted; and that the maſter might ſtrike a jury *by conſent*, which was alſo granted, being only a caſe of *miſdemeanor*, but *not in capital caſes*; for then the priſoner would loſe his challenges, and it was never aſked to replead upon mending the information. 12 *Mod.* 224.

If there be *no legal exception againſt the ſheriff*, the court cannot ſlip him, and order another to ſtrike a ſpecial jury, without *conſent* of the *parties*, to try an iſſue at the aſſizes; but if there is any lawful objection againſt him, and it appears to be ſo on affidavit made, then a ſpecial jury may be ſtruck by the maſter of the office, without conſent of the parties. But a ſpecial jury may be granted to *try a cauſe at bar*, without conſent of the parties; but never at the *niſi prius*, unleſs good cauſe ſhewn; by three juſtices, *contra* Ch. J. 8 *Mod.* 245, 248.

His Majeſty's courts of *King's Bench*, *Common Pleas*, and *Exchequer* at *Weſtminſter*, upon motion made in behalf of his Majeſty, or on the motion of any proſecutor or defendant in an indictment or information for any miſdemeanor, or information in the nature of a *quo warranto* in the *King's Bench*, or in an information in the *Exchequer*, or on motion of any plaintiff or defendant in any cauſe depending in the ſaid courts, are required to order a jury to be ſtruck before the proper officer for the trial of any iſſue, in ſuch manner as ſpecial juries are uſually ſtruck in ſuch courts on trial at bar. *Stat.* 3 *Geo.* 2. *c.* 25. *ſect.* 15.

The perſon who ſhall apply for ſuch jury ſhall pay the fees for ſtriking it, and ſhall have no allowance for the ſame on taxation of coſts. *Ibid. ſect.* 16.

The juſtices of the ſeſſions or aſſizes for the counties palatine of *Cheſter*, *Lancaſter* and *Durham*, on motion on behalf of his Majeſty, or of any proſecutor or defendant, in any indictment or information for miſdemeanor, or on the motion of any plaintiff or defendant, may, in caſe they think fit, order a jury to be ſtruck before the proper officer of each court, in ſuch manner as ſpecial juries have been

been usually struck in the courts at *Westminster* upon trials at bar. *Stat.* 6 *Geo.* 2. *c.* 37. *s.* 2.

The sheriff ought not to return privilege to be exempt from juries; but he ought to summon, and shall not be liable to an action. *Sid.* 243. *pl.*

The case was, *venire fac'* was awarded to the sheriff of the city and county of *Canterbury*, to return a jury here at the bar, and on the *distringas* the sheriff returns this to be an ancient city and county, and that the King had granted to them an exemption, not to serve in any jury out of their city, except in cases of high treason; and by express words, that they should not serve *coram ipso rege*.

*By the court*—First, the return is ill; because if it were in the power of the sheriff to return privilege, he cannot do this upon the *distringas* or *habeas corpora*, as he did here; because by the returning of the *venire*, *viz.* that there are 24 *prob. & legales homines*, he had concluded himself, there being also pledges upon every such return.

Secondly, that the sheriff may not return so at any time, but ought to return them summoned, and the parties ought to come here; and then every person who had cause of privilege ought to claim here in person, and not the sheriff for them. *Mo.* 883. *pl.* *Sid.* 293. *pl.* The court awarded an *alias distringas*, in regard the sheriff cannot vary from the first *venire* returned, but must have the same men. *Keb. Rep.* 867. *pl.* and no action lies against the sheriff upon their delivery of the writ of exemption. *Hard.* 389.

In *Rol. Rep.* 119. an action on the case adjudged to lie against the sheriff, for returning one of a jury who lived in a place which is exempt; and 4 *Inst. cap.* 130, 382, 447, 461, 488. action on the case lies against the sheriff, for returning a person exempt of a jury.

The sheriff must not return *magis remotos, minus sufficientes, & magis suspectos*, by the statute 13 *Ed. stat.* 1. *c.* 38. and if he do, the plaintiff or demandant shall recover damages by the statute, if he be delayed, and the defendant if he lose his land, and 28 *Ed. stat.* 3. *c.* 9. gives double damages to the demandant.

The sheriff, by statute 13 *Ed. stat.* 1. *c.* 38. must not return men decrepit, *Senes ultra* 70 *annos homines non in patriâ commorantes*; this statute is a direct prohibition in itself, and therefore the party aggrieved may have an action on the act against the sheriff, without giving notice of sickness, or *non-commorancy*; yet the custom is to sue out a writ

grounded on this ſtatute, that he return them not, and notice by word is good, if notice were requiſite. 2 *Inſt.* 477.

The equity of this ſtatute, and alſo the reaſon of the thing, ſeem plainly ſo far to extend to grand juries, that if it ſhall appear that any of the perſons above mentioned be returned on a grand jury, the court will eaſily excuſe their non-appearance. But it ſeems clear, that any ſuch perſons, being returned on a grand jury, may lawfully ſerve upon it if they think fit. 2 *Hawk. pl. Cr.* 216. *ſect.* 20.

If a juror is above the age of 70, or is ſick, or is non-reſident in the county, he may ſue out a writ of privilege for his diſcharge; but if he be returned and appear, he can neither be challenged by the party, nor excuſe himſelf from not ſerving, if there be not ſufficient without him. 2 *Hawk. pl. Cr.* 418. *ſ.* 26.

Peers of parliament not to be impanelled, nor tenants in ancient demeſne.

Where the demandant or plaintiff is delayed of his ſuit, by ſuch return of the ſheriff, as *magis remotos*, he ſhall by the ſtatute recover damages againſt him; or where the defendant, after he has loſt his land by the oath of them ſo returned contrary to the form of the ſtatute, and after he doth convict them in an attaint, and ſo is reſtored, he may then have his action on the ſtatute for his damages. 2 *Inſt.* 448.

If one dwell in *Middleſex*, and had freehold in the county of *York* over 40*l.* the ſheriff of *York* may not ſummon him to *Middleſex* to try a cauſe at the bar in *Weſtminſter* for land in *Yorkſhire*. 13 *Ed. ſtat. c.* 42. *Rol. Rep.* 163.

In a writ of right, or any other writ, a baron of the realm may excuſe himſelf. 2 *Hawk. pl. Cr.* 415.

Upon a trial between a peer and another, the ſheriff muſt return a knight; but if he do not, and the peer doth not challenge the array, but the jury gave verdict, he ſhall not have advantage of this afterwards.

A jury was impanelled of the town of *Southampton*, and called to the bar and made default, and the men of that town ſhewed to the court a grant made to the inhabitants of that town, that no return ſhould be made of the men of that town to be of any jury, and prayed the allowance of their charter; and the court appointed them to plead their charter, and ſo they did. *Brownl.* 36.

Upon

On a petition from the governor and other gentlemen of the *Isle of Wight* to the King in council, suggesting that the inhabitants of that island ought to be *exempted from serving on juries, &c. in the county of* Southampton, *unless in matters concerning lands, and things relating to the said island*, and this *for the better defending the said island.* This matter was referred to Sir *John Keyling* Chief Justice, and to call to his assistance *Archer* J. the judge of the last assize there, who certified that they had called before them the clerk of the assize for the county of *Southampton*, and others of great experience, who informed them, that in all former times sheriffs have been chosen, and grand jurymen returned of the inhabitants of the said island; but that the judges had always been careful, on extraordinary occasions of danger from any foreign enemy, to excuse the appearance of those inhabitants, when their attendance was necessary for the defence of the place; and they certified, that they conceived it would be a great inconvenience to the county of *Southampton*, that the inhabitants of so large and rich a place as that island is, should be totally exempted from those duties which are incumbent on the inhabitants of that whole county, *&c.* And after this certificate they heard no more of the business. 21 *Vin. Abr.* 209. *pl.* 8.

If a man has a charter of exemption, and shews it to the sheriff, yet he may return him, for the sheriff is not a judge to allow or disallow his charter, but he must sue out a writ of allowance of his charter, and deliver the writ to the sheriff, and shew his charter to him; and then if the sheriff return him, an action on the case lies against him.

On a *Dorsetshire* trial at the bar, on default of all the jurors but three, it appeared, that the sheriff had, by command of the plaintiff, countermanded the summons against the gree of the defendant, who now prayed a trial; but this being impossible, for the court in such case will not supply the jury with *tales de circumstantibus*: but they offered to *nonsuit* the plaintiff on record, and conceived the defendant should contribute to the payment of the jury, because they should remain indifferent jurors. 2 *Sid.* 77.

Return of a *distringas*, for appearance of the defendant in the hustings. 2 *Saund.* 233.

Return of a jury by the bedels of the four next wards. 2 *Saund.* 244.

If the sheriff return but 40*l.* which is the usual issues on a *distringas juratores*, the court on prayer of the party cannot cause him to return greater; but only make a rule, that good issues be

returned. But by *Twiſden* J. an action on the caſe lies againſt the ſheriff. *Keb.* 475.

The plaintiff ought to bring a writ againſt the ſheriff on averment, that he might have levied greater iſſues, and ſo the court may increaſe them.

*Note.* Before ſtatute 13 *Ed. ſtat.* 1. *c.* 39. the plaintiff could not aver againſt the return of the ſheriff if he returned too ſmall iſſues, for he is but an officer in court, and has no day in court to anſwer plaintiff party; but now by *ſtat.* 1 *Ed.* 3. the plaintiff may aver what the value of the iſſues be, rents of the land, corn in the grange, hay in the barn, all moveables except riding-furniture, and utenſils of the houſe.

## *As to the Return of the grand Inqueſt.*

BY *ſtat.* 11 *H.* 7. *c.* 9. No indictment ſhall be found by any perſons named by the juſtices, without due return of the ſheriff, but by inqueſt of lawful liege people returned by the ſheriff.

One *Scarlet*, whom the ſheriff had not returned, by confederacy betwixt him and the clerk who read the panel, procured himſelf to be ſworn of the grand jury, with intent to indict his neighbours maliciouſly, and he did ſo; he was adjudged an offender within this law, and by *ſtat.* 3 *H.* 8. *c.* 10.

The juſtices of gaol-delivery, or juſtices of the peace, of whom one to be of the *quorum*, in open court may alter the panel returned by the ſheriff to inquire of the King only, by addition or ſubtraction of any of the jurors ſo returned, and they have power to command the ſheriff to put others in the panel according to their diſcretion. And the ſheriff ought to return the panel ſo reformed, upon the penalty of the ſaid act. So that none can be of any grand inqueſt but by the return of the ſheriff. 12 *Rep. Rob. Scarlet's* caſe.

It is very needful for the high-ſheriff to have a book containing the names of all the freeholders in his county, and their ſufficiencies, that he may make the panels according to his oath, and better know pledges and ſureties.

As for iſſues loſt for default of appearance, *ſcilicet* by jurors, or by tenant or demandant; the ſheriff may not levy till they ſhall be eſtreated under the ſeal of the *Exchequer*, and the ſame delivered to him, for without warrant he may not levy the ſame. 27 *Ed. c.* 7.

Other

*Erroneous Proceedings and Misdemeanors of Sheriffs about and concerning Jurors.*

AFTER the parties were at issue in trespass, and an *habeas corpora* awarded against the jury, the *Common Bench* (in which the action depended) awarded a *supersedeas quia improvide, &c.* which was delivered to the sheriff, who notwithstanding returned the jury, and tried the cause. This was assigned for error, and, in *nullo est erratum* pleaded, it was adjudged error. For the error assigned is a matter of fact, depending on a matter of record; and then the defendant by pleading *in nullo est erratum* had confessed this, (that is to say) that such *supersedeas* was awarded and delivered to the sheriff before the trial. Upon which it follows, that after the *supersedeas* delivered, the hands of the sheriff are closed, that he cannot proceed to distrain the jury, nor to return the writ before the justices of assize. It is a manifest error, if the sheriff return the writ of *habeas corpora* at the assizes of *nisi prius* after *supersedeas* awarded for staying the return of the writ; as the proceedings are erroneous in inferior courts after *habeas corpus* delivered without a *procedendo*. *Yelv.* 57. *Cro. Jac.* 43. *pl.*

It is not necessary for the sheriff to return the panel of the jurors names, but to say they are *de vicineto* of such a place; for so it shall be intended, and the forms of all returns of jurors are so.

In a writ of error eleven jurors were returned and one stranger; yet because it was the return of the sheriff, it shall not abate. *Rol. Rep.* 302.

The statute of 27 *Eliz. c.* 6. provides, there shall be two hundredors in a jury; yet it is never seen that the return of the sheriff is so. So statute of 42 *Ed.* 3. *c.* 11. is, that the sheriff shall arraign the panel in assize four days before the assize, yet it is never returned to be so done; but such reasonable things shall be intended to be done, unless the contrary appear. 2 *Sid.* 144.

An attorney was picked over the bar, for giving directions in writing to a sheriff to return jurors names. *Mo.* 882. *pl.* 1237.

All jurors (other than strangers upon trials *per medietatem linguæ*) to be returned for trials of issues joined in the courts of *King's Bench*, *Common Pleas* or *Exchequer*, or before justices of assize or *nisi prius*, *Oyer* and *Terminer*, gaol-delivery or quarter-sessions, in any county of *England*,

*England*, ſhall have within the county 10*l.* by the year, of freehold or copyhold, or ancient demeſne, or in rents, in fee-ſimple, fee-tail, or for life; and in every county of *Wales*, every ſuch juror ſhall have 6*l.* by the year as aforeſaid; and if any of a leſſer eſtate be returned, it ſhall be a good cauſe of challenge, and the party returned ſhall be diſcharged upon the ſaid challenge, or upon his own oath. And no juryman's iſſues ſhall be ſaved but by order of court, for ſome reaſonable cauſe proved upon oath; and all iſſues ſhall be duly eſtreated and levied; and the writ of *venire facias* for impanelling of juries in caſes aforeſaid, in *England* ſhall be after this form:

*Rex*, &c. *præcipimus*, &c. *quod venire fac' coram*, &c. *duodecim liberos & legales homines de vicineto de* A. *quor' quilibet habeat decem librat' terræ tenementor' vel reddituum per annum ad minus, per quos*, &c. *et qui nec*, &c. And the writs for returning of juries in *Wales*, ſhall be in the ſame manner, altering only the word *decem* for *ſex*; and the ſheriff ſhall not return any perſon unleſs he have 10*l.* or 6*l.* reſpectively by the year at leaſt, in the county; upon pain to forfeit for every perſon 5*l.* to their Majeſties. *Stat* 4 & 5 *W.* & *M.* *c.* 24. *ſect.* 15. 3 *Geo.* 2. *c.* 25. *ſect.* 20.

They muſt be ſummoned ſix days before the day of their appearance, and none ſhall take a reward to excuſe a juror's appearance, on pain to forfeit 10*l.* to their Majeſties. *Stat.* 7 *W.* 3. *c.* 32. *ſ.* 5. 4 & 5 *W.* & *M.* *c.* 24. *ſ.* 16.

This act extends not to cities, boroughs or towns corporate. *Stat.* 7 *W.* 3. *c.* 32. *ſ.* 12. 4 & 5 *W.* & *M.* *c.* 24. *ſect.* 17.

Any perſon having land in his own right of the yearly value of 20*l.* over and above the reſerved rent, being held by leaſe for the abſolute term of 500 years or more, or for 99 years, or any other term determinable on one or more lives, the name of every ſuch perſon ſhall be inſerted in the liſts, and in the freeholders book; and ſuch leaſeholder may be ſummoned to ſerve on juries as freeholders may. *Stat.* 3 *Geo.* 2. *c.* 25. *ſ.* 18.

From hence it appears, that lands *freehold*, *copyhold*, *ancient demeſne*, *or leaſehold*, do render perſons liable to ſerve on juries. And ſome have thought that all lands are included under theſe denominations. And in *Coke's Copyholder*, *p.* 14. it is ſaid, that what land ſoever is not copyhold, is freehold. And in *Cathr.* 41. it is ſaid, that copyhold lands may differ in name, but not in nature; for although copyhold lands may be ſpecially ſo called, becauſe holden by copy of court-roll, and cuſtomary lands, by ſome ſpecial cuſtom; yet they are all held in one general kind, that is by cuſtom, and the diverſity of their names doth not alter the nature of their tenure. Nevertheleſs

vertheleſs, although all copyhold lands are cuſtomary, yet all cuſtomary lands are not copyhold, and conſequently, as ſuch, do not qualify a man to ſerve on juries. Of which kind of cuſtomary lands not being copyhold, the greater part of the county of *Weſtmorland* in particular doth conſiſt, for which cauſe (and by reaſon of the number of perſons being diſqualified by being quakers) the jurors in that county are in compariſon but few. To remedy which inconvenience, it ſeemeth not unreaſonable, that in the ſtatute limiting the qualification of jurors, amongſt other denominations of tenure, the word *cuſtomary* ſhould be inſerted; for why ſhould a copyholder of 10 *l.* a year be obliged to ſerve, and a cuſtomary tenant of 100 *l.* a year be exempted.

By *ſtat.* 3 *Geo.* 2. *c.* 25. *ſect.* 3. If any ſheriff or officer ſhall ſummon and return any perſon to ſerve on any jury before the juſtices of aſſize, *niſi prius*, or judges of the great ſeſſions in *Wales*, or of the ſeſſions for the counties palatine, whoſe name is not inſerted in the duplicates tranſmitted to him by the clerk of the peace; or if any clerk of the aſſize, judge's aſſociate, or other officer, ſhall record the appearance of any perſon ſo ſummoned and returned, who did not really appear; then any judge of aſſize, *niſi prius*, &c. ſhall, upon examination in a ſummary way, ſet ſuch fines upon ſuch ſheriff, &c. for every perſon ſo ſummoned and returned, and for every perſon whoſe appearance ſhall be ſo falſely recorded, as the ſaid judge ſhall think meet, not exceeding 10 *l.* nor leſs than 40 *s.*

No perſons ſhall be returned as jurors at any aſſizes or *niſi prius*, &c. who have ſerved within one year before in the county of *Rutland*, or four years in the county of *York*, or within two years in any other county, not being a county of a city or town; and if any ſheriff ſhall wilfully tranſgreſs therein, any judge of aſſize, &c. is required, on examination and proof of ſuch offence, in a ſummary way, to ſet a fine upon ſuch offender, not exceeding 5 *l.* *Id. ſect.* 4.

By *ſtat.* 4 *Geo.* 2. *c.* 7. *ſect.* 2. No perſon ſhall be returned to ſerve as a juror at *niſi prius* in *Middleſex*, who has been returned at *niſi prius* in the ſaid county in the two terms or vacations next preceeding, under ſuch penalty upon the ſheriff, &c. as might have been inflicted for any offence againſt the ſaid clauſe.

By *ſtat.* 3 *Geo.* 2. *c.* 25. *ſect.* 5. Every ſheriff, &c. ſhall regiſter the names of ſuch perſons as ſhall be ſummoned and ſerve as jurors at any aſſizes, &c. alphabetically, and the times of their ſervices; and every perſon ſo ſummoned and ſerving ſhall, upon application to the ſheriff, &c. have a certificate teſtifying his attendance, which the ſheriff, &c. is to give without fee; and the book ſhall be tranſmitted by the ſheriff, &c. to his ſucceſſor.

By the ſame *ſtat. ſect.* 6. No ſheriff or other perſon ſhall take any reward, to excuſe any perſon from ſerving on juries; and no officer appointed to ſummon juries ſhall ſummon any perſon other than ſuch whoſe name is ſpecified in a mandate ſigned by the ſheriff, *&c.* and if any ſheriff or officer ſhall wilfully tranſgreſs in the ſaid caſes, any judge of aſſize, *&c.* may, on examination and proof of ſuch offence, in a ſummary way, ſet a fine on any perſon ſo offending, not exceeding 10 *l.*

By the ſame *ſtat. ſect.* 17. Where a ſpecial jury ſhall be ordered by rule of court, in any cauſe ariſing in a county of a city or town, the ſheriff ſhall be ordered by ſuch rule to bring the books of perſons qualified to ſerve on juries within the ſame, in like manner as the freeholders book hath been uſually ordered to be brought, in order to the ſtriking of juries for trials at bar, and the jury ſhall be ſtruck out of ſuch books.

On a motion for a ſpecial jury, in the caſe of the *King* v. *Makartney* for the murder of the duke of *Hamilton*, it was held by *Parker* Chief Juſtice, that there cannot be a ſpecial jury in caſes of *treaſon* or *felony*; for the party muſt have the advantage of challenging *twenty*, without cauſe ſhewn. In caſes of ſpecial juries, there are 48 brought before the maſter, and he takes 24; ſo there cannot be a rule for a good jury, nor for a ſpecial jury in this caſe of a trial at bar; for the jury will be the ſame with or without ſuch a rule, for they are all good juries in *Middleſex*, and ſo in all caſes of jurors at the bar; and if there ſhould be a ſpecial jury, it would take away the advantage the party has of challenging peremptorily, but indeed it would not of ſhewing cauſe. So no rule was made in this caſe, for fear that the ſheriff in all other caſes, when there is no ſuch rule, ſhould not return a good jury. *By court.* 21 *Vin. Abr.* 301. *pl.* 5. 2 *Burn's Juſt.* 4*to edit. p.* 9.

By *ſtat.* 3 *Geo c.* 25. *ſect.* 19. The ſheriffs of *London* ſhall not return any perſon to try any iſſue joined in any of his Majeſty's courts of *King's Bench*, *Common Pleas* or *Exchequer*, or to ſerve on a jury at the ſeſſions of *Oyer* and *Terminer*, or ſeſſions of the peace to be held for the city, who ſhall not be a houſekeeper within the city, and have lands, *&c.* or perſonal eſtate to the value of 100 *l.* and the ſame cauſe alledged by way of challenge, and found, ſhall be admitted as a principal challenge; and the perſon challenged may be examined on oath of the truth of the matter.

By the ſame *ſtat. ſect.* 20. perpetuated by *ſtat.* 6 *Geo.* 2. *c.* 37. The ſheriffs or other officers ſhall not return any perſon to ſerve on a jury for the trial of any capital offence, who would not be qualified to ſerve as a juror in civil cauſes; and the ſame matter ſhall be a principal

tipal challenge; and the perſon ſo challenged may be examined on oath of the truth of the matter.

By *ſtat.* 4 *Geo.* 2. *c.* 7. *ſect.* 3. All leaſeholders upon leaſes where the improved rents ſhall amount to 50 *l. per ann.* over and above ground-rents or other reſervations, ſhall be liable to ſerve upon juries.

## *Of Challenges.*

A challenge to the jurors is two-fold:

To the { Array, Polls.

To the array, is to except againſt all the perſons impanelled, and as to this, there is a

Challenge { Principal, or for Favour.

*Note.* That the challenges to the array is in reſpect of the partiality or default of the ſheriff, or other officer that made the return, and not in reſpect of the perſons returned, where there is no partiality or default in the ſheriff. For if the challenge to the array be found againſt the party that takes it, yet he ſhall have his particular challenge to the polls.

If the ſheriff, or other officer, be of kindred or affinity to the plaintiff or defendant, if the alliance continue, it is a good cauſe of challenge. *Bulſtr.* 5, 6, 7, 8.

It is clearly a good challenge to the array, that the ſheriff is couſin to the wife of the defendant, though the wife is no party to the action; but it muſt be averred that that ſhe was alive, or had iſſue at the making of the panel.

The jury may try a challenge for coſinage of the ſheriff to the plaintiff or defendant, and ſometimes the coroners, or attornies in court, are *Eliſors.* 2 *Rol. Rep.* 363. 2 *H. H. P. C.* 275. *cap.* 36. 21 *Vin. Abr.* 286. *pl.* 18.

If the defendant challenge the array, for that the ſheriff is couſin to the plaintiff; it is no counterplea of the challenge, that the ſheriff is alſo couſin to the defendant; but the array ſhall be quaſhed, becauſe the defendant firſt took the challenge.

If any one or more of the jury be returned at the nomination of the party, plaintiff or defendant, the whole array ſhall be quaſhed.

A challenge was taken to the array, becauſe the ſheriff was couſin to the leſſor in *ejectment*, and concludes not to the favour; it is a principal challenge. And in *Rol. Rep.* 183. it is adjudged a principal challenge; yet in *Rol. Abr.* 328. *Gueſt* and *Bridgman*, ſays, it is not a principal challenge that the leſſor is couſin. But in the lord *Brook*'s caſe it is held a principal challenge. *Cro. Jac.* 547. *pl.* 6.

A *venire fac'* was awarded to the coroners on ſurmiſe, that the leſſor in *ejectment* was a ſervant to the ſheriff. It was doubted, whether it was a principal challenge, in 1 *Jac. Harbottle*'s caſe. *Coke* ſaid, it was adjudged in 27 *El.* in *Packington*'s caſe, that it was not a principal challenge; but in *Spicer*'s caſe it is reſolved otherwiſe. *Cro. Jac.* 21. *Dy.* 7, 367.

If the challenge be taken for coſinage, it ought to be ſhewed *coment* couſin; but in ſuch caſe challenge to a juror is not neceſſary.

If the plaintiff or defendant have an action of *battery* or *debt* againſt the ſheriff, or if the ſheriff have parcel of the land depending on the ſame title; or if the ſheriff or his bailiff be either of counſel or attorney, or ſervant or goſſop of either party, all the array ſhall be quaſhed.

A prayer to *Eliſors* in trials at bar may be at the ſuit of the defendant or plaintiff; but in *niſi prius*, at the prayer of the plaintiff only.

Conſanguinity or affinity are the principal cauſes; but it is no challenge to the array, if all the jurors be of affinity.

Challenge to the array for favour, that the ſheriff is ſervant to the plaintiff, or was arbitrator for a party; that the ſheriff purchaſed part of the land in queſtion; that one party is tenant or ſervant to the ſheriff.

Malice between the ſheriff and one of the parties, is good cauſe of challenge, that one of the parties has brought an action of *debt* againſt the ſheriff, *&c.* but not that the officer has debt againſt the party; for he may demand his debt without malice.

But this kind of challenge, being no principal challenge, muſt be left to the conſcience and diſcretion of the triers.

Secondly,

Secondly, *challenge to the polls, i. e.* to the particular jurors; and these are of four ſorts.

1. Peremptory, without ſhewing any cauſe; and this for treaſon is 35. Felony 20.

2. Principal challenge to the polls; ſo called, becauſe it ſtands of itſelf, without leaving any thing to the conſcience or diſcretion of the triers. Now this is ſuch matter as proves evident favour or enmity in the juror.

And this is, *propter reſpectum*; as the nobility may be challenged, or he may challenge himſelf. *Propter defectum*, as aliens, villains; not having freehold ſufficient; not having two hundredors. *Propter affectum*, as jurors of kin or blood to either party; that he has formerly tried the cauſe; counſel, not a commiſſioner for examination of witneſſes; fellow-ſervant; for favour; *propter delictum*, as outlawed, *&c.*

3. Challenge to the poll muſt ſhew cauſe preſently. After one hath taken challenge to the poll, he cannot challenge the array.

4. If the plaintiff alledge a cauſe of challenge againſt the ſheriff, the proceſs ſhall be directed to the coroners; and if any cauſe againſt all the coroners, then the court ſhall appoint *Eliſors*. Sometimes two of them that be impanelled.

When any one challenge is made to the polls, two triers ſhall be appointed by the court.

*Note.* All challenges muſt be taken before the jurors are ſworn.

No challenge ſhall be admitted againſt the triers, appointed by the court.

There may be a challenge to the panel by exception to the ſheriff, after a *tales* prayed to him. So after a *venire fac'* prayed to him, tho' the cauſe of challenge were before the prayer. *Hob.* 235.

Upon a writ of error the record was certified, that the challenge was to the ſheriff for coſinage, and after a *venire fac'* awarded to the coroners; upon the diminution it may not be certified, that the challenge of the coſinage was after the return of the *venire fac'*; becauſe this is contrary to the record before certified. *Rol. Abr.* 764.

That the ſheriff was *quondam* ſervant to the defendant, Earl of *Rutland*, is no principal challenge; it is paſt and executed. *Otherwiſe* had it been ſo at the time.

To ſay, that between the ſheriff or officer that returns the panel, and one of the defendants, there was an action of *treſpaſs* then depending, is a principal challenge.

## *On the Writ of* Habeas Corpus.

AN *Habeas corpus* is either *ad ſubjiciend'*, which is granted on the criminal ſide, or an *habeas corpus ad reſpondend', recipiend'* or *faciend'* granted on the plea ſide; for ſo the court of *King's Bench* is divided in the practice of it, (that is to ſay) into *criminal* cauſes between the King and the party, and *civil* cauſes between ſubject and ſubject.

An *habeas corpus ad reſpond'* is, when any one is impriſoned at the ſuit of another upon a legal proceſs in the *Fleet*, or any other priſon except the *King's Bench* priſon, and a third perſon would ſue that priſoner in this court *(B. R.)* and cannot, becauſe he is not in cuſtody of the marſhal of this court, there he may have an *habeas corpus* to remove the priſoner out of the priſon where he is, into this court, to anſwer to his action here. 14 *Vin. Abr.* 210. *pl.* 1. This is called an *habeas corpus cum cauſâ*, and does remove the priſoner for whom it is granted, and all the cauſes which are then depending againſt him; for on an *habeas corpus* to an inferior court, to remove *corpus cum cauſâ*, i. e. *the body and cauſe*, they ought to return all the cauſes that are depending there concerning the party that has the *habeas corpus*, if any of the cauſes depending be above 5 *l.* *Stile's Rep.* 150.

When an *habeas corpus* is awarded, and bail taken, though they be not filed, yet preſently the priſoner is diſcharged, and his ſureties alſo in the inferior court. *Cro. Jac.* 203. *pl.* 5.

One was in execution in the *Fleet*, for a debt recovered againſt him in *C. B.* he being before condemned in the *King's Bench* for another debt, was by *habeas corpus cum cauſâ* removed into the *King's Bench*. The court held, in this caſe he may acknowledge ſatisfaction for both debts in *B. R.* he being in the cuſtody of the marſhal for both debts. If the marſhal ſuffers him to eſcape, he ſhall be charged for both the debts. *Dy.* 152, 307.

An

An *habeas corpus* to remove one committed for debt from one priſon to another, may be granted returnable *immediate* or *indilate*, for this is only an *habeas corpus ad recipiend'* in the nature of it.

An *habeas corpus* is not a record till it be returned and filed, and then it cannot be amended; but it may be amended before it is filed.

Whatſoever perſon, or by what means ſoever he was committed, the concluſion of the return ought to be, *Corpus tamen ejus paratum habeo*; yet it cannot always be ſo. *Leon* 70.

An *habeas corpus ad ſubjiciend'* is always intended to him that has the body, though *ad faciend'* may be circular, as an *habeas corpus* was directed to the chancellor of *Durham*, that he may make a precept to the ſheriff, to have the body *coram nobis apud Weſtm.* The return is, that the chancellor iſſued a precept to the ſheriff to return his body before him, and that the ſheriff returned *paratum habet*; and it is not ſaid the chancellor had him here, which is all *by court*, for it ſhould be *cujus corpus paratum habeo* in this court. 3 *Keb. Rep.* 279. *pl.* 30.

An *habeas corpus* was directed to the ſteward and marſhal of the *Marſhalſea*, for one *H.* The marſhal returns, the ſaid *H.* was committed to his cuſtody by *command of Sir* F. W. *Knt. principal ſecretary of ſtate, and one of the Queen's privy council.* This is inſufficient, becauſe the commitment is not ſet down in the return. Then it was amended and returned in this manner: *By the advice and command of the Queen's whole privy council, ſo that we cannot have his body.* This, *by the court*, is inſufficient alſo; he ought to have concluded, *yet I have his body ready.*

On a writ of *latitat*, the ſheriff returned, that he had arreſted the defendant, and that ſuch a day, and before the return of the *latitat*, an *habeas corpus* was to bring the body into *Chancery*, and theret he priſoner was diſcharged; the return is good, for the ſheriff is bound to obey the King's writ, and he cannot compel the parties to put in ſureties here in *B. R.* But it was ill done of the *Maſter of the Rolls* to diſcharge him. *By the court*—We have oftentimes perſons here upon *habeas corpus*, who are alſo arreſted by proceſs out of the *Exchequer*, or of the *Common Pleas*; but we will not diſcharge them before they have found ſureties for their appearance, and we cannot puniſh the ſheriff, for the *habeas corpus* was firſt returnable before the *latitat*. But becauſe the return was, *that he was diſcharged out of our cuſtody*, which might be intended as to the cauſe in *Chancery* only, and not for the cauſe here, for he has not alledged that he was committed to any other in cuſtody; the ſheriff was to amend his return. *Leon* 145. *pl.* 201.

A return

A return of an *habeas corpus* by the warden of the *Fleet*, was *for a contempt out of the court of Chancery*. It is not good. *Rol. Rep.* 92.

On an *habeas corpus*, the ſheriff returns, that the juſtices of peace committed the plaintiff for a fine on contempt, for which the court awarded him to remain in priſon till payment. *Sid.* 144.

The return on *habeas corpus* was a protection. *Leon.* 71. *pl.* 93.

*Note.* The return of an *habeas corpus* ought to be written on parchment, and not on paper; for the return is to be filed and made a record of court, and all records are to be written on parchment; and therefore, after the return is read and filed in court, it cannot be amended. But in *Hob.* 113. an *habeas corpus* was returned without the ſur-name of the ſheriff, and after verdict amended.

It is agreed, the return of an *habeas corpus* need not be ſo punctual as a plea, becauſe not made by perſons of ſuch learning as pleas are; but if they be good to a common intent and ſubſtance, it is enough.

On *habeas corpus* granted by the *King's Bench* to the warden of the *Fleet*, to have here in court the body of *D. W.* the ſame returnable at a day certain; at which day the warden of the *Fleet* did refuſe to make his return, and to bring in the body. And the court entered a rule to bring in the body of *D. W.* the next day *ſub pœna* 20*l.* and ſo are all precedents of felony and treaſon.

*Note.* If it appear that the commitment is good, and there is good cauſe, the court remands the priſoner; if it is not good, they diſcharge him; if it be doubtful, they bail him.

The ſheriff may ſuggeſt, that the party will not pay his charges of return of *habeas corpus*, *ad faciend' & recipiend'*, which is at the ſuit of the party. But *contra* in *habeas corpus*, *ad faciend' & ſubjiciend'*, which is at the ſuit of the King, he muſt return at his peril. *Keb. Rep.* 272. *pl.* 57. 280. *pl.* 79.

On *habeas corpus* to remove any priſoner, the ſheriff muſt return the writ, and the court will allow his charge here. So in the caſe of the ſteward of ——————.

On *habeas corpus*, the officer ought to bring the priſoner to the court, and the court ſhall tax charges and compel payment, if the officer and priſoner or plaintiff cannot agree, or payment be not made according to the agreement. 2 *Jo.* 178.

A pri-

A priſoner was brought up from *Oxford* gaol by *habeas corpus*, in order to be turned over to the *King's Bench*; but the court refuſed to do it, becauſe the ſheriff was not paid the charges of bringing him up, and ſo was remanded. *Stra.* 308.

On a motion againſt the warden of the *Fleet*, it was held, that if an *habeas corpus* is brought, he muſt obey it, though the party refuſes to pay his fees; for he has a remedy for them. 2 *Stra.* 814.

On a *habeas corpus*, the gaoler is bound to bring the body, though he has not the charges tendered him; but he may move the court and they will rule that he ſhall have his charges firſt. 2 *Show.* 172.

A gaoler at his own charge brought up a priſoner on a *habeas corpus*, and the priſoner refuſing in court to repay the gaoler, he was remanded by rule of court. *Cumb.* 36.

A gaoler may detain a priſoner after a *habeas corpus* directed to him for his fees, but not for chamber rent, *&c.* *Cumb.* 109.

The plaintiff cauſed the defendant to be brought up by *habeas corpus* from *S.* and now the gaoler moved to be allowed his *charges* for bringing him up; but the court ſaid, he ſhould have agreed with the plaintiff before he brought him. *Holt* Chief Juſtice bid him to take his action againſt the plaintiff for his charges. *Cumb.* 229.

## *On the Writ of Inquiry.*

IF a writ of inquiry of damages be returnable, *Oct. Mich.* the ſheriff may take the inqueſt, and enquire the damages the day of the return; and if he returns it the ſame day, the writ is well executed. *Cr. El.* 468. *(bis) pl.* 26. 7 *Vin. Abr.* 214. *pl.* 2. 17 *Vin. Abr.* 539. *pl.* 4. 2 *R. Raym.* 1449. *Lil. Abr.* 876. (E.) *Mo.* 403. *pl.* 537. *Id.* 712. *pl.* 998. *Barnard. K. B.* 4.

On a motion to ſet aſide a writ of enquiry for two irregularities; the firſt was, for that the notice for executing it was at ſuch a day at eleven o'clock, and it was executed half an hour after eleven, though the defendant was not there; *whereas* by the rules of the court, it ought not to have been executed till an hour after the notice, if both parties are not there ready. The other irregularity was, that the plaintiff gave no evidence to the jury, and yet they have given him damages, which he ſaid was always a cauſe for ſetting them aſide; accordingly the court did ſet it aſide. *Barnard K. B.* 33. 2 *Barnard. K. B.* 214.

On a writ of enquiry, the inqueſt was impanelled the *eſſoign-day* and the jury then hear the evidence *two* or *three* days after, yet this is well executed. 17 *Vin. Abr.* 539. *pl.* 4.

A writ of inquiry was returnable *tres Trin.* which happened to be on a *Sunday*, ſo that the *eſſoigns* were kept on the *Monday*; the writ was returned to have been executed on the 14th of *June*, which was the *Monday*, *i. e.* the day after the return. And by the whole court, although without doubt a writ may be executed on the day of its return, yet if that day be ſuch as it cannot legally be done on, you ſhall not do it the next day. 2 *Salk.* 626. *pl.* 8. 6 *Mod.* 148, 149. 2 Ld. *Raym.* 1066. *Barnard. K. B.* 356.

A writ of inquiry was executed 15 *June*, which was on a *Sunday*; held naught, and that they might take advantage of it on a writ of error, though not aſſigned it for error. *Forteſ. Rep.* 373. *Stra.* 387.

A writ of inquiry directed to the coroners of *N.* was executed by *H.* clerk to the coroners, and their known deputy, but only by verbal appointment, without deputation under hand and ſeal from the coroners. *The court* ſeemed inclinable to ſet the inquiry aſide for want of a proper authority in *H. Pract. Reg. C. P.* 451. 2 *Barnes* 325. *Rep. & Caſ. of Pract. C. P.* The court ſaid, the verbal appointment was no authority, but the objection was waived by defendant's having made defence. *Held*, that a writ of inquiry executed before an under-ſheriff's deputy, was improperly executed, for a deputy cannot appoint a deputy. 2 *Barnes N. C. P.* 187. *Pract. Reg. C. P. Rep. & Caſ. Pract. C. P.*

An inquiry executed before a deputy appointed by a deputation under the ſeal of the ſheriff's office, good; and rule to ſhew cauſe why an inquiry, *&c.* ſhould not be ſet aſide. Diſcharged with coſts. 2 *Barnes* 188. *Pract. Reg. C. P. Rep. & Caſ. Pract. C. P.*

On a writ of inquiry on a judgment by default, on an *aſſumpſit*, (if it be inſiſted on) plaintiff muſt prove his debt; for by the judgment plaintiff is to recover, but the *quantum* is to be inquired into by the jury, and if plaintiff is to recover, *&c.* if plaintiff proves nothing, he muſt be content with a penny, or ſome ſuch ſmall matter of damages. 7 *Vin. Abr.* 315. *pl.* 6. *Ventr.* 347. 2 *Shew. Rep.* 86.

The execution of a writ of inquiry before 14 jurors was held good, for it is but an inqueſt of office whereon no attaint lies. 2 *Stra.* 1159. *Noy* 142.

In

In this writ, to inquire of damages in *treſpaſs*, the jury cannot find that no treſpaſs is done. Neither may the ſheriff make ſuch a return, but if the jury will find no damages, the ſheriff muſt make his return accordingly.

In all ſuperior courts, the judge ſends his precept to the ſheriff to inquire of damages; but in *London*, and in all other inferior courts, an inqueſt is ſummoned in court, and the court takes the inquiſition of damages. 3 *Salk.* 400. *pl.* 2.

On executing a writ of inquiry, notes muſt be produced and proved; pleading is not a ſufficient admiſſion of them. 2 *Barnes's Notes C. P.* 192. Held contrary in the *K. B.* 2 *Stra.* 1149.

If on the executing a writ of *inquiry of damages*, the ſheriff refuſes to ſwear and examine ſome of the witneſſes produced on either part, and yet does execute the writ, the court will grant a new writ to the party aggrieved, for the old writ was not well executed.

A writ of *inquiry of damages*, directed to the ſheriff, cannot be executed by a bailiff of a liberty. *Hob.* 83.

A writ of *inquiry of damages* varied in the return from the award in the roll, which was amended and made agreeable to the roll. *Mo.* 711. *pl.* 998.

A writ of *inquiry* cannot be quaſhed till it be returned and filed, but before the return it may be ſuperſeded, *quia erronice emanavit*; *per Holt*, 6 *Mod.* 40. And by him you cannot except againſt a juror, upon executing a writ of inquiry. *Ibid.* 43. *Inſtr. Cler.* 558.

## *On Execution.*

IF a man recover damages in action on the caſe, againſt *J. S.* in the *King's Bench*, the ſaid *J. S.* being in *cuſtod' mareſchal'*; yet he ſhall not be in execution on this judgment, although it be within the year, before prayer of the plaintiff; for the marſhal may not take notice of every judgment againſt every priſoner; but upon prayer of the plaintiff, a *committitur* ſhall be entered on the roll, and then he is in execution, but if the defendant, being taken in execution, be brought in by *habeas corpus*, and then an entry of the *committitur* is made in the book of the office, it is good. 2 *Rol. Rep.* 104. *pl.* 43, 133. *pl.* 11. *Cro. Jac.* 364. *pl.* 3. *Leon.* 58. *pl.* 74.

If a man recover in *C. B.* debt and damages againſt *J. S.* and has judgment, although that *J. S.* be a priſoner in the *Fleet* for other cauſes (which is the priſon of the *Common Bench*) and the warden informs the court of it, and the court commands him to retain him in execution until ſatisfaction of the judgment; yet he is not in execution, becauſe he was not brought to the bar by *habeas corpus*, and viewed, and demanded of the priſoner, if he be the ſame perſon, who is condemned or not; and it is the office of the court to oppoſe him. *Dy.* 13, 14. *Cro. Eliz.* 506. *pl.* 63. Then if the warden informs the court of *Chancery*, that *J. S.* (which is a priſoner there on a judgment) is in his ward for certain cauſes, on which the court commands the warden to return him in execution, until ſatisfaction of the judgment; yet *J. S.* is not in execution on the judgment, becauſe this was not done at the requeſt of the plaintiff, but without his prayer, for it may be he will elect another execution. *Dy.* 63, 306.

In *debt* againſt *J. S.* if the defendant be taken on a *latitat*, and committed to the marſhal for default of bail, and after the plaintiff recovers againſt him, he continuing in priſon; yet he ſhall not be in execution for this judgment before the prayer of the plaintiff. 10 *Vin. Abr.* 572. *pl.* 1.

If a man recover in debt, and outlaw the defendant after judgment, and after within the year, the defendant is taken by *cap' utlegatum*, he ſhall be in execution for the plaintiff before prayer, becauſe the outlawry was at the ſuit of the party. 5 *Co.* 88. *Cro. El.* 706. *pl.* 28, *Mo.* 566. *pl.* 772. See *Salk.* 280. 5 *Mod* 201. *Fitzgib.* 265. *Bridgm.* 7. 7 *Mod.* 65. Otherwiſe it is, if he be taken in execution, after the year, becauſe in that caſe he may not have any *capias* againſt him. *Cro. Eliz.* 467. 5 *Mod.* 200. But if a man outlaw the defendant in debt after judgment, and after within the year the defendant is taken by *cap' utlegatum*, although he be in execution for the plaintiff *prima facie*; yet he may make election, that it ſhall not be an execution for him. *Cro. El.* 850. *pl.* 6. See 5 *Mod.* 201. *Mo.* 598. *pl.* 817.

If execution by default be awarded in a *ſcire fac'* upon a judgment in debt, and the defendant four years after was in the *Fleet* for other cauſe; and by *habeas corpus* he was brought up to the *Common Bench*, and being oppoſed by the court, if he were the perſon who was condemned, *ut ſupra*, and he grants it, he ſhall be committed in execution at the prayer of the plaintiff as it ſeems, though it be after the year and day. *Dy.* 147, 214.

If *A.* recover againſt *B.* by judgment in the *King's Bench*, and on this *B.* renders himſelf to priſon, and after brought a writ of error, and

and had a *superſedeas*; yet after upon prayer of the plaintiff, the court may commit him in execution, although that the record be removed; foraſmuch as he had not found bail on his writ of error. 10 *Vin. Abr.* 575. *pl.* 7.

Upon recovery the ſheriff may break open an houſe, and deliver it to the plaintiff; for the writ ſays, *fac' ſeiſinam* or *poſſeſſionem*. And after judgment, it is not the houſe of the defendant in right. 4 *Bac. Abr.* 455.

On a *capias ad ſatisfaciend'*, the ſheriff may not break open any man's houſe to make execution; but in all caſes, when the door is open, he may enter to make execution of body or goods. 4 *Bac. Abr.* 454.

In all caſes where the King is party, ſo in *Hue* and *Cry*, if no door be open, the ſheriff may break open the houſe to take him, or to do execution or other proceſs; as upon a *cap. utlegat'*, or upon contempt: but he ought firſt to ſignify the cauſe of his coming, and requeſt the owners to open the door, but not to break open any man's houſe by night. 4 *Back. Abr.* 454. *Yelv.* 28. 5 *Co.* 91. *Cro. El.* 908. 4 *Leon.* 41. *pl.* 111. *Cro. El.* 909. 14 *Vin. Abr.* 316. *Cro. El.* 742. *pl.* 17.

On a *fieri fac'*, or *extendi fac'*, the ſheriff may not enter into the houſe of any, the door being ſhut, nor draw a latch, no not after a requeſt and denial; yet though the ſheriff be a treſpaſſer in breaking open the houſe by *fieri fac'*, the execution is good. 4 *Bac. Abr.* 454.

The houſe of any one is not privileged but for himſelf and his family, and his own proper goods, not to protect any who flie there, or the goods of another conveyed there; and in ſuch caſe after requeſt, the ſheriff may break open the door. See *Foſt. Cr. Law* 319. 14 *Vin. Abr.* 316. 19 *Vin. Abr.* 432. 4 *Bac. Abr.* 455.

The ſheriff, *&c.* under colour of a *latitat* and an outlawry, made a violent entry with drawn ſwords, *&c.* where the outward door was open, and no oppoſition made, broke open the chamber door, arreſted the defendant, took appearance upon the *latitat*, and 4 *s.* for ſuing out a *ſuperſedeas* upon the outlawry, and ſo diſcharged him; and the ſheriff was fined 200 *l.* for the unneceſſary terror and outrage, and for not ſignifying that he was ſheriff, that the door might have been opened without violence, but eſpecially for diſcharging the plaintiff upon the *cap' utlegat'*. *Hob.* 263, 264.

On a *fieri fac'*, a barn which ſtands in the field may be broken by the ſheriff, becauſe it is not part of the dwelling-houſe, and there needs

needs no requeſt; *aliter* had the barn been adjoining, and parcel of the houſe. *Sid.* 186. *pl.* 11. *Bulſt.* 146. *Keb. Rep.* 698. *pl.* 22. 4 *Bac. Abr.* 455. 19 *Vin. Abr.* 432.

But though a ſheriff cannot break open a houſe, being to take execution by *fieri fac*; yet when the door is open that he enters, then he may and ought to break open the door of an entry or chamber which is locked, or break open any cheſt which is locked and take the goods, and if he do not, an action on the caſe lies againſt him. *Brownl. Rep.* 50. 2 *Show. Rep.* 87. *pl.* 78. 4 *Bac. Abr.* 456. *Comb.* 17, 327.

Where the execution is lawfully begun, there the ſheriff or his officers may break the houſe to make execution; otherwiſe when it is not lawfully begun. If one be arreſted by the ſheriff, and he eſcapes to his own houſe, and the ſheriff purſues him and breaks open the doors of his houſe, and takes him again, the party ſhall never take benefit of this his own wrongful eſcape. 4 *Bac. Abr.* 556.

Two of the under-ſheriff's bailiffs entered into the houſe, the door being open, to make execution of the goods, and the plaintiff ſhuts the door upon the bailiffs, and impriſoned them for two hours; the ſheriff may break open the houſe to reſcue his bailiffs. *Cro. Jac.* 555. See 19 *Vin.* and 4 *Bac.* as above.

The ſheriff was fined for breaking open an houſe, and ruſhing in with ſword drawn, the door being half open, on private proceſs.

If a bankrupt convey his goods to his neighbour's houſe, the commiſſioner's ſerjeant may not, but the ſheriff may break open the houſe, becauſe he is a ſworn officer of the King's. *Goodwin's Law againſt Bankrupts*, 65.

On a commiſſion of rebellion out of *Chancery*. the ſheriff may break open the houſe to apprehend the party therein, whether in his own or another's houſe. *Cromp. fo.* 47.

The ſheriff may take the *poſſe comitatus* to do execution, *per ſtat. W.* 2. *cap.* 39. and he may take it *poſt vel ante querimoniam*, but he muſt take it after reſiſtance, and not before; for *ſequi debet potentia juſtitiam non præcedere.* 2 Inſt. 445.

But ſuppoſe the ſheriff cannot do execution by the *poſſe comitatus*, then ſays the book, *Keb. Rep. pl.* 91, 117. *pl.* 22. he ought to acquaint the deputy-lieutenants of the county, and if they aſſiſt not he muſt acquaint the King and council, and yet the ſheriff ſhall not be

be amerced, if he return he cannot do execution; but in *Godb.* 79. upon a reſiſtance of execution, the council-table refuſed to meddle in it, becauſe the court of *King's Bench* ought to ſee their own judgment executed. And a writ was prayed to the high-ſheriff with a ſpecial rule, that the high-ſheriff ſhould execute it himſelf, which the court granted, and a tipſtaff to fetch the under-ſheriff up to return his writ, which is better than an attachment which is returnable by itſelf. *Goulſb.* 79. *pl.* 14.

And it ſeems the ſheriff is bound to do and make executions at his peril, and to that end may take the *poſſe comitatus.*

If recognizance of bail be taken by a judge of the *Common Pleas* at *Serjeants Inn* in *London*, upon an original brought in *London*, and he certifies this into the court of *Common Pleas*, and it is there inrolled, but it appears on record, that it was taken as before; a *fieri fac'* may be awarded upon this recognizance to the ſheriff of *London* where the *capias* was, for there was the commencement of it, and alſo the *ſcire fac'* may be awarded to the ſheriff of *Middleſex* where the recognizance was inrolled. 19 *Vin. Abr.* 281. *pl.* 5.

*Weſt.* 2. *c.* 18. ſays, *Vic. ei liberet medietat' per rationabile extent', (viz.) per inquiſition'*, and the ſheriff is ſworn, and a ſerjeant at mace is not ſworn to take a jury; yet the ſtatute extends to every other immediate officer to any of the King's court of record, and ſo a ſerjeant may execute this, and a *fieri fac'* alſo, and this ſtatute couples an *elegit* with a *fieri fac'*, and limits both to be executed by the ſheriff, or his officer, but in waſte and rediſſeiſin, the ſheriff muſt do it in perſon. 4 *Co.* 65, 66.

If a man recover damages in action of waſte in one county, the writ to levy them ſhall iſſue to the ſheriff of the ſame county where the action was firſt brought, and not to any other; but if the ſheriff return he had nothing, he ſhall have execution by *teſtatum*, into any other county where the recoverer will.

It lies againſt ſuch perſons againſt whom a *capias* does lie in the commencement of a ſuit, as debt, account, action on the caſe, treſpaſs *Vi & armis*, annuity and covenant; but it lies not for a recovery of damages in a real action.

One being in execution by *ca. ſa.* which is returned, no other execution can be ſued againſt him, his lands and goods, 21 *Jac. c.* 24. but it is otherwiſe after his death.

A *capias* is to have the body of ſuch a one ſuch a day, and the ſheriff brings the body, or returns the writ before the day, it is good. *Winch.* 7.

If one be delivered in execution by the King's writ, he is presently in execution and in custody, without laying hands on him to arrest him; by *Coke* C. J.

The sheriff is to be excused for taking one by a false name in execution; and if the judges admit this false name, yet the judicial writ ought to be examined by the sheriff. *Lane Rep.* 49, 52.

One in execution may not be discharged by *habeas corpus* or writ of *privilege*, he shall not be set at large. *Sid.* 289. *Id.* 90.

The sheriff may execute process of execution against one attaint of felony and in custody, if he please; and if the felony be pardoned or the attainder reversed, he shall be in execution. 11 *Vin. Abr.* 23. *pl* 1. See *Fost. Cr. Law* 62. *Salk.* 500. 7 *Mod.* 153. 2 *R. Raym.* 848, 1572. 2 *Stra.* 873.

If a man recovered debt against *B.* and levy part of the debt by *fieri fac'*, which is returned; yet he may take the body of *B.* by a *cap' ad satisfac'* for the residue. *Hob.* 58. *Lev.* 92. 2 *R. Raym.* 1451. *Str.* 226.

Though the King's debtor be in execution by his body or his land, yet the subject may take him in execution by his body; for the statute of 15 *Ed.* 3. 13. is to be intended of execution of lands and goods, and not of the body, which is *tout a tout*. *Hob.* 160.

The sheriffs of *Bristol* took the plaintiff by a *cap' ad satisfac*, and detained him in prison until the party defendant, and now plaintiff, paid the money to the sheriff. *Per cur'*—This was contrary to his warrant, which is, *ita quod habeas denarios curia*; and because he did not so, he is chargeable to him that was in execution. *Hetl.* 122.

A *capias ad satisfac'* was returnable *quinden mart'*, and that writ was returned *album breve*, and a *testatum* thereupon, and the defendant taken by it. The *testatum* issued out accordingly, because the *capias* was not returned. And the court granted a *supersedeas*. *Brownl.* 40.

Debt on judgment in *B. R.* the defendant confesses the judgment, and execution above a year; and not being able to find the plaintiff, he paid the money to the marshal, plaintiff replies, he did not absent voluntarily; and the defendant demurs. *Judgment* for the plaintiff. The sheriff on *cap'* cannot receive the money as on *fieri fac.* nor is the party remediless, for he may pay his money into court. *Leon.* 140. And have an *audita querela*; but the plaintiff were remediless should the gaoler be insolvent.

Defendant

Defendant on indictment and conviction of a diſorderly houſe, was committed to the marſhal for payment of a fine, but before actual impriſonment the fine was paid to the marſhal; yet reſolved, this is no proper payment, and the party was forced to pay it over again. *Per Jones*—It is doubtful whether voluntary payment to the ſheriff on *fieri fac'* before execution of his goods, be pleadable in diſcharge (but that is adjudged it is ſo,) much leſs on a *cap'* which is *ad ſatiſfaciend'* the party in court, and he is committed *quouſque ſatisfaciat parti*, not the ſheriff. 3 *Keb. Rep.* 788. *pl.* 43.

If the iſſue be, whether the ſheriff took *J. S.* and kept him in priſon under his cuſtody in execution by force of a *capias ad ſatiſfaciend'*; and the jury found he took him by force of an *alias cap' ad ſatisfaciend'*; although it is not found he kept him in execution for the debt and damages aforeſaid, according to the iſſue; yet this is a good ſpecial verdict. For it ſhall be intended; for the conſequence is neceſſary of that which is found, becauſe he cannot take him, but he ought to be in execution. *Hob.* 82. 11 *Vin. Abr.* 28 *pl.* 22.

How execution upon a *ca. ſa.* ſhall be ſued upon a judgment againſt two or more, and though there ſhall be but one ſatisfaction, yet the ſheriff may take the bodies of all in execution. 5 *Co.* 86.

One taken on a *capias utlegat'* after judgment after the year, is in execution of the party's ſuit. *Sans* prayer. *Salk.* 319. *Comb.* 373.

Goods pawned ſhall not be taken in execution for the debt of him which pawned them, during the time they are pawned. *Kitchen* 226.

The ſheriff upon a writ of *execution* may not ſeize and ſell to the party a furnace annexed to the freehold; for this would be waſte in the leſſee. 10 *Vin. Abr.* 560. *pl.* 1. *Cro. El.* 374. *pl. Ow.* 70, 71.

Fats, coppers, tables and partitions were ſet up by a ſope-boiler, for the convenience of his trade, and who alſo paved the backſide, *&c* and theſe were all taken in execution by the ſheriff on a *fi. fa.* and it was held good by *Holt* Ch. Juſt. *Salk.* 368.

The goods eccleſiaſtical of clergymen are not to be taken by the ſheriff, but by the biſhop, upon a *levari fac'*, on a recognizance. 2 *Inſt.* 472.

If one ſell any goods to another depending an action againſt him, theſe goods afterwards ſhall not be put in execution; for they were lawfully bought, (if *bona fide*, and for a valuable conſideration.) But

if a *fieri fac'* be directed to make execution of goods, and after the *teſte* of the writ, and before the ſheriff executes it, the party ſells his goods *bona fide*, they may nevertheleſs be taken in execution; (*altered* by the *ſtat.* of *frauds* and *perjuries.*) *Cro. El.* 174. *Mo.* 21. *pl.* 72.

By *ſtat.* of *frauds* and *perjuries*, no writ of execution ſhall bind the property of goods, but from the time of its delivery to the ſheriff, under-ſheriff, or coroners; who upon receipt thereof (without fee) ſhall indorſe on the back thereof the day of the month and year when they received it.

If the party dies after the writ of *execution* awarded, and before it be ſerved, the ſheriff may ſerve it on the goods in the hands of the executor. For by the execution awarded the goods are bound, and the ſheriff needs not take notice of his death. *Leon.* 144, 145.

The ſheriff may have *trover* or *treſpaſs* at election, againſt him that takes them away. *Sid.* 438. *pl.* 3. *Ventr.* 52, 53. *Lev.* 282. 2 *Saund.* 47. *Mod.* 30. *pl.* 75.

The plaintiff being ſheriff ſeized the goods in execution by force of a *fieri fac'*, and after (and before the ſale of them) the defendant takes them and carries them away, and converts them to his own uſe; and the plaintiff (being ſheriff) brings his action of *trover*; and adjudged the action well lies. By the ſeizure of the goods in execution, the ſheriff has a property in them, ſo that he may reſeize them and ſell them, as well when he is out of his office as before. 2 *Saund.* 47. *Mod.* 57. 2 *Saund.* 344. *Cro. Jac.* 73. *pl.* 2. *Mo.* 757. *pl.* 1045. Adjudged that the ſale was good, becauſe the ſheriff was chargeable with the value. *Yelv.* 44. S. C. adjudged *contra*, that the ancient ſheriff cannot ſell the goods, but it is not ſtated there, that the ancient ſheriff had paid any part of the money recovered. 2 *Saund.* 47. cites S. C. as adjudged in *Mo.* 757. *Cr. Jac.* 73. *Dalt. Off. Vic. cap.* 2. *fo.* 19. contrary to the *Rep.* of *Yelv.* 44. and ſays that the roll of this caſe is in *Eaſter.* 44 *El. Rot.* 318. S. C. cited 2 *Saund.* 345. and *Hale* Ch. J. ſaid, that the roll of it is in *Paſch.* 44 *El.* 618. *Mod.* 31. cites S. C.—S. C. cited by *Gould.* J. 2 Ld. *Raym. Rep.* 1073. S. C. cited *Vent.* 319, 320. but adds, (*ſed nota*, the court ſaid that if the old ſheriff had returned that the goods had remained in his hands *pro defectu emptorum*, a *diſtringas* ſhould have gone to have had them delivered to the new ſheriff, and then a *venditioni exponas* ſhould have gone to the new ſheriff. See *Yelv.* 44.) *Salk.* 322. *pl.* 10. reſolved that the old ſheriff has not only authority, but is bound and compellable to proceed in the execution; for the ſame perſon that begins an execution ſhall end it, and a *diſtringas nuper vicecomitem* lies; of theſe there are two ſorts, one is to diſtrain the old ſheriff to ſell and bring in the money, and the

other

other is to sell and deliver the money to the new sheriff to bring into court; which plainly shews his authority continues by virtue of the first writ. 6 *Mod.* 290. S. C. held accordingly. 11 *Mod.* 35. S. C. If one sheriff levies, the succeeding sheriff shall not go on with it, but the old sheriff; for after goods are once levied, a *supersedeas* cannot stop the completion of the execution which a writ of error only can do. 11 *Mod.* 35. *pl.* 6. *Barnard. K. B.* 81. accordingly. 10 *Vin. Abr.* 569. in notes.

After the debt levied, the sheriff is debtor to the plaintiff, and capable of a release from him; the action ceasing against the defendant is *ipso facto* by the law transferred to the sheriff, having both the judgment to make it a debt, and the levy to make him answerable; and though action of *account* will properly lye in this case, yet the same will many times bear both actions, though the monies be received by *auter mains*, or the like. *Hob.* 206, 207.

If a sheriff levy money upon a *levari facias*, upon a recognizance at the suit of *J. S.* and returns the writ served; *J. S.* may have the debt against the sheriff's executors. But in that case the plaintiff demurred to the defendant's plea, and concludes ill. *Rol. Abr.* 418.

The plea was grounded upon a release, and should have demanded judgment if the defendant should be admitted to plead a release made after the sheriff had made his return, and in such case an action lies against the sheriff's executors, although it does not appear that the *fieri fac'* on the judgment was returned; for this is not material, inasmuch as the party is discharged by payment of it without return: and this is not grounded on a personal *tort*, but on a contract in law; and this is not a simple contract, but principally grounded upon a record. *Mar.* 13. *pl.* 33. *Jo.* 430. *pl.* 2. *Cr. Car.* 539. *pl.* 3. *Hob.* 206. *Brownl.* 51. *Hut.* 11, 12. *Mo.* 886. *pl.* 1224. *No.* 22. 2 *Show.* 281. *pl.* 271. 2 *Show.* 79. *pl.* 63.

Action on the case was brought by an executor against the sheriff, who had levied the debt in execution, and did not return the writ; and after the testator died, and the plaintiff for that *tort*, *in vita testatoris*, and for the loss which came to him, brought the action. The *quære* was, if it lies by the executor; because it is a personal wrong to the testator; and the court was divided. *Cro. Car.* 297. But the better opinion is, that the action lies against the sheriff.

If the sheriff in executing a *fieri fac'* does not misbehave himself, he shall not be charged in debt or *scire fac'* unless it appear by his return that he had the monies in his hands. 10 *Mod.* 53. As if the sheriff return, *cepi & seisiri feci in manus meas bona & catalla ad valentiam* 160 l. *quæ remanent in manibus meis ab defectum emptorum.*

On this return the ſheriff ſhall not be charged in debt or *ſcire facias*, becauſe it appears not that he has miſbehaved himſelf. But if upon the *fieri fac'* the ſheriff return, that he hath levied the money, and doth not pay it to the plaintiff at the return of the writ, the plaintiff may have a *ſcire fac'* againſt the ſheriff, to ſhew cauſe wherefore the money ſhould not be levied of the ſheriff. 2 *Saund.* 344, 345. *Hut.* 32.

So if in a *fieri fac'* to levy 200 *l.* debt, *&c.* the ſheriff returns, that he had made a warrant to his bailiff, who had ſeized divers goods of the ſaid *S. ad valentiam* of 160 *l.* and that they were reſcued out of their cuſtody; *ita quod* he could not levy the debt, and that the ſaid *S. nulla alia habuit bona.* The plaintiff may bring a *ſcire fac'* to have execution againſt the ſheriff for the monies, according to the value returned, and the ſheriff ſhall pay it out of his own proper goods. *Andr.* 247. *pl.* 260. 2 *Saund.* 341. *Sav.* 123. *pl.* 192. *Cr. El.* 208, 209. *pl.* 4.

With this agrees 9 *Ed.* 4. 50. *ſcire fac'* 21. if the ſheriff return upon a *ſcire fac'*, that he hath levied the money, and hath the ſame in court, but hath not the money at the day, and then a new ſheriff is choſen; in this caſe it being on record, that the money is levied by the old ſheriff, a *ſcire fac'* ſhall iſſue againſt the old ſheriff to pay it; and if he cannot, or will not diſcharge and pay the money, the party ſhall have a *fieri fac'*, or *elegit* againſt the ſheriff, of his proper goods.

On *fieri fac'* the ſheriff ſeized ſeveral goods which were mercery ware, and returns *fieri fac' ad valentiam*, which return was filed. The ſheriff appears, and prays to amend the return, becauſe ſome of the goods were impaired by lying, and he could not get buyers.

*Per cur'*—1. Such return may not be altered, after it is returned and filed.

2. Where the ſheriff returns *fieri fac' ad valentiam*, this ſhall be no excuſe of his payment of the money, becauſe he might have returned he had ſeized the goods, and that they remain *pro defectu emptorum*, and then he may be excuſed, if the *bona peritura* periſh. *Sid.* 40.

Therefore the ſheriffs were ordered to pay the money, and to anſwer *interrogatories* for their contempt, having been ordered to bring in the money, and not appearing till a tipſtaff was ſent.

As to amendment of returns, matter of form in a return is amendable, but not matter of fact, which goes to the juſtification of impriſonment. 2 *Bulſt.* 259.

If the

If the ſheriff have a *fieri fac'* againſt a man's goods, and before execution he pay him the money, in this caſe he cannot do execution after; and if he do, an action of treſpaſs or falſe impriſonment lies againſt him.

The ſheriff, upon a *fieri fac'*, cannot deliver the defendant's goods to the plaintiff in ſatisfaction of his debt, but muſt return the execution in court. *Cro. Eliz.* 504. *Noy* 56.

An action on the caſe was brought againſt the ſheriff, for fraudulent omiſſion of execution of goods, that were *in conſpectu ſuo*; but he ſaith not in his declaration, that he knew them to be the goods of the defendant in that action. And for this omiſſion after verdict, judgment was arreſted by *Twiſden* and *Windham*. *Keb. Rep.* 946. *pl.* 7. the giſt of the action is the fraud, which cannot be without notice, which is now wrapt in the verdict, though it could not be pleaded, the ſheriff being bound to take notice whoſe goods they are.

On *fieri fac'* againſt *J. S.* who has goods of *A.* in his poſſeſſion, if the ſheriff ſells theſe goods, *trover* or *treſpaſs* will lie againſt him; and to prevent this, all the ſheriffs of *England* take ſecurity. *Keb. Rep.* 693. *pl.* 10. *Sid.* 83. *pl.* 3.

In debt againſt the ſheriff, the plaintiff declared upon a judgment obtained againſt *J. S.* and had ſued out a *fi. fa.* and delivered it to the defendant, who by virtue thereof had levied the money. The defendant pleads *nihil debet*, and adjudged a good plea. And this difference was taken, that where the writ has not been returned, the plea is good; becauſe it is matter of fact, whether he has levied the money or not; *ſecus* where the writ is returned *fieri feci*. 12 *Mod.* 604.

In *detinue* the plaintiff had judgment, and brought a *ſcire fac'* to have execution. Defendant pleads, that upon a *diſtringas* to the ſheriff on that judgment, he delivered ſuch goods to the ſheriff, and for the reſidue, that they were appraiſed at ſo much by inquiſition taken by the ſheriff, and that he delivered the money to the ſheriff; but he doth not aver this matter to be returned by the ſheriff. It is a good plea, for otherwiſe the defendant ſhould be prejudiced, for he might have twenty ſeveral executions ſerved againſt him upon one judgment; and he ſhould be put to his remedy againſt the ſheriff only, who may be inſolvent, and it is a leſs miſchief to enforce the plaintiff, if his plea be true, to take his action for it againſt the ſheriff; and if it be not true, to take iſſue thereupon. *Cro. Eliz.* 390.

Now if the ſheriff levy goods by force of a *fieri fac'*, and delivers them not to the party, nor returns the overplus, the plaintiff may have

a new

a new *fieri fac'*, becauſe a record ſhall not be avoided by a matter in fact; but by the taking the goods of the defendant to the value of the debt by the ſheriff, the defendant is diſcharged, although the ſheriff do not ſatisfy the plaintiff; therefore he ſhall not have a new execution. 2 *Rol. Rep.* 57. *Rol. Abr.* 902. Q.

Where a ſheriff on a *fieri fac'* returns, that he had ſeized goods of leſſer value, which were reſcued, and that *nulla alia bona*, &c. the plaintiff may not ſue a new execution, but only for the ſurplus beyond the value of the goods reſcued. 2 *Saund.* 344.

If the ſheriff levy money in execution, the Lord Keeper cannot order the money ſhall ſtay in the ſheriff's hands, or order that the plaintiff ſhall not call for it. *Mar.* 54.

If the ſheriff ſhall return *fieri feci, ſed non inveni emptores*, then a *venditioni exponas* ſhall go out.

If the defendant tenders the debt, it is wrong for the ſheriff to ſell the goods. *Keb. Rep.* 655. *pl.* 34.

If goods remain in the ſheriff's hands for default of buyers, and there periſh, the ſheriff ſhall not be chargeable; but if the ſheriff refuſes a buyer, an action on the caſe lies. 2 *Keb. Rep.* 464. *pl.* 48. *Sid.* 483. *pl.* 18.

The ſheriff took the defendant's goods in execution by *fieri fac'*, and before ſale the record was removed by a writ of error into the *Exchequer-chamber*, and a *ſuperſedeas* awarded; and the ſheriff returned upon the *fieri fac'*, ſeizure of the goods, and that they remained in his hands *pro defectu emptorum*; and he alſo returned, that a *ſuperſedeas* was awarded, &c. And hereupon it was prayed for the defendant, that he might have reſtitution of his goods. *Cro. Eliz.* 597.

But *per curiam*—Although this record be removed, and notwithſtanding the *ſuperſedeas* awarded, in regard it came not to the ſheriff till he had begun to make execution, as appears by his return, that a *venditioni exponas* ſhall be awarded to perfect it.

And although the plea-roll be removed, yet it ſhall be awarded on the return of the *fieri fac'*, which remains ſtill in the office. But as it is in *Keb. Rep* 324. *pl.* 51. if the error were allowed before ſeizure, then, though the ſheriff be unpuniſhable in that caſe, yet *ſuperſedeas*, notwithſtanding execution done, ſhall go, *quia improvide*, &c.

And

And *per curiam*—If the goods be ſold, the money may be brought into court to be reſtored to the party; but if not, the goods may in *ſpecie* be reſtored.

But if before the ſale a *ſuperſedeas* comes to him, if the ſheriff after ſells the goods without a writ of *venditioni exponas*, this is void. But *Holt* Chief Juſtice ſaid, that the ſheriff might ſell notwithſtanding. 6 *Mod.* 293.

The ſheriff ſells bricks for 7 *s. per thouſand*, on the place, for which he might have 16 *s. per thouſand*. The queſtion was, who ſhould pay the overplus, the buyer or the ſheriff's executors? And *per curiam*—The ſheriff's executors ſhall pay the overplus, the ſale being abſolute, and not an agreement to ſell. 3 *Keb. Rep.* 285. *pl.* 8.

The ſheriff perſuaded the jury to prize the goods at an under-value, and ſo ſold them. This is an oppreſſion enquirable at the aſſizes by indictment. *Cro. Jac.* 526. and *Cro. Jac.* 514, 515.

If the ſheriff upon a *fieri fac'* againſt *J. S.* ſeize certain wood whereof *J. S.* was poſſeſſed, and the ſheriff pay parcel of the money received, and does not return his writ, and after the ſheriff is removed and another ſheriff is choſen, and after the writ of diſcharge delivered to him he ſells the wood, this is a lawful ſale; becauſe by the ſeizure, although the writ is not returned, he is chargeable to the party. *Trin.* 3 *Jac.* 73. *Ayer* and *Alderley*. And there a *diſtringas* iſſued to the new ſheriff, to diſtrain the ancient ſheriff to expoſe to ſale, which does not give to him authority to ſell, but compels him to do that which he might do by law. But if upon a *fieri fac'* the ſheriff returns that he had ſeized the goods, but *non invenit emptores*, and after he is removed, and a new ſheriff made, the old ſheriff may not ſell them after, though a *diſtringas* come to him; and if he ſell them, the ſale is not good, for the new ſheriff muſt ſell them. 4 *Leon* 20. *pl.* 66. *Lat.* 117.

A *venditioni exponas* may not be awarded, if it appears that the goods are out of the hands of the ſheriff. 2 *Saund.* 344.

The ſheriff (if he think fit) may ſell goods without a *venditioni exponas*, and the ſale ſhall be good. *Cro. Jac.* 73.

If *A.* recovers againſt *B.* damages and coſts in *C. B.* or *B. R.* and ſues out a *fieri facias* to the ſheriff, who by force thereof takes the goods of *B.* to the value, and ſo returns it, and the goods remain in his hands *pro defectu emptorum*; after *A.* well knowing thereof, yet to the intent to vex and double charge *B.* ſues out another *fi. fa.* and delivers it to the ſame ſheriff to be executed, who thereupon levies

the money of other goods of *B.* and pays it over to *A.* In this case, for this wrong vexation, though it was in a legal way, an action upon the case lies. *Hob. Rep.* 257, & 350. *Cro. Eliz.* 574. *Cro. Jac.* 667.

If the sheriff do make execution on *fieri fac'*, though he never return the *fieri fac'*, yet the execution is good. *Aliter in elegit. See below.* And if the sheriff levy the money, and give it to the plaintiff, though he never make any return to the court, it is good enough. 4 *Co.* 64.

The bailiff of the *Savoy* levied goods, and yet returns *nulla bona* on attachment; and for cause saith, that one *V.* at the time of the execution, shewed a bill of sale on good consideration, whereby, if he executed it, he was liable to an action; and therefore, without security to save him harmless, he refused to make any other return, which the court agreed, and ordered the money to be brought into court; and as the trial goes between the sheriff and *V.* the return to be amended or not. *Keb. Rep.* 901. *pl.*

Upon a *fieri facias*, the sheriff returns, *quod nihil habet*, this is not good without saying further, *nec habuit post receptionem brevis.*

On recovery of a debt on *fieri fac'*, directed to the sheriff of *London*, he returned, *quod clericus est beneficiatus in Ely.* The court conceived this return improper, in regard there should have been a suggestion on the roll, after the return made by the sheriff of *London*, that the defendant had goods in *Ely*, and that the sheriff of that county should have made this return of *clericus beneficiatus.* Now if the sheriff of *London* return *nulla bona*, but that he is *clericus beneficiatus* in *Ely*, thereupon went a *fieri fac'* to the bishop of *Ely* on a *testatum*, and he returned that he had *nulla bona ecclesiastica*; this return by some is not good, but he ought to return a *sequestration*, having admitted him to be *clericus beneficiatus*; but he is not estopped to say, that he is not *clericus beneficiatus* by the return of the sheriff. The court agreed the *fieri fac'* well directed to the bishop, and not to the sheriff, but they conceived it a good return; and if it be false, the plaintiff may have his action on the case. *Keb. Rep.* 497. *pl.* 74. 2 *Keb. Rep.* 83. *pl.* 84.

On a statute, if the sheriff return *quod est clericus beneficiatus nullum habens laicum feod'*, *nec bona nec catalla*, but that he is *beneficiatus* in such a diocese, then a writ of sequestration shall go to the bishop to sequester the profits, and to deliver them to the conusee until he be satisfied. 2 *Rol. Abr.* 474.

If there be false return on a *fieri fac'*, the remedy is by action on the case. In a *fieri fac'* to the sheriffs of *London*, they return *nulla bona*,

*bona*, but that he is *clericus beneficiatus* in *Ely*; upon which a writ iſſues to the biſhop of *Ely*, and he returns *nulla bona eccleſiaſtica*. If it be ſo that he hath a ſpiritual living, the plaintiff may have action on the caſe againſt the biſhop. *Sid.* 276.

The party may aver the value of the goods greater than the return, but the ſheriff is eſtopped. 2. *Keb. Rep.* 789. *pl.* 27. 821. *pl.* 32.

On a *fieri facias* directed to a ſheriff, put the caſe there are goods, in which (as it often happens) others claim a property; in this caſe, whether he returns *fieri feci*, or *nulla bona*, (and one he muſt) he will be liable to an action. But if it ſhall appear that he has acted fairly and indifferently, the law ſhall ſecure him whatever return he makes, and whether his return be true or falſe. 10 *Mod.* 53.

If a man recover damages and had execution by *fieri fac'*, and upon a *fieri fac'* the ſheriff ſells the term for years to a ſtranger, and after the judgment is reverſed, he ſhall only be reſtored to the money for which the term was ſold, which was by default of the party, and not of the term itſelf, becauſe the ſheriff had ſold this by command of the writ of *fieri fac'*. *Dy.* 363. 8 *Co.* 143. 5 *Co.* 90. *b.*

If the goods of a man outlawed be ſold by the ſheriff upon a *capias utlagatum*, and after the outlawry is reverſed by the writ of error, he ſhall be reſtored to the goods themſelves, becauſe the ſheriff was not compellable to ſell theſe goods, but only to keep them for the uſe of the King. 5 *Co.* 90.

But upon *fieri fac'*, he ſhall have reſtitution only to the value.

1. Elſe none would buy.

2. By *fieri fac'*, the ſheriff is compellable to levy the debt upon the goods; one is *cumpulſio*, the other *voluntas*. 8 *Co.* 143.

If a man recover damages (as ſuppoſe in a writ of *covenant*) againſt *B.* and had *elegit* of his chattels, and of the moiety of his lands; and the ſheriff upon this writ delivers a leaſe of years of land which *B.* had, to the value of 50*l.* part of the ſum recovered, and after *B.* reverſes the judgment, he ſhall be reſtored to the term itſelf, and not to the value. For though the ſheriff might have ſold the term upon this writ, yet here is not any vendition to a ſtranger, but a delivery of the term to the party who recovers, by way of extent without any ſale, and therefore the owner ſhall be reſtored; for the ſheriff is not bound by this writ to ſell the term, as in a *fieri fac'*.

*Quære*, for this is a ſale, all the term being delivered to the party according to the value in groſs, and not annual. *Rol. Abr.* 778.

If perſonal goods were delivered to the party *per rationabile pretium & extentum* upon reverſal of the judgment, he ſhall be reſtored to the goods themſelves for the ſame reaſon.

A leſſee for 99 years, by his will deviſed his leaſe in theſe words, (viz.) *I deviſe my leaſe to my wife during her life, and after her death, I will that it go to her children unpreferred*; and made his wife executrix and died. The wife entered and married with *J. S.* and afterwards for 140 *l.* debt recovered againſt *J. S.* on a *fieri fac'*, the term was ſold by the ſheriff, and afterwards the judgment was reverſed by writ of *error*, and awarded, *quod omnia quæ amaſit ratione judicii reſtituantur.* The wife (the executrix) died. And, *per curiam*, theſe points were reſolved;

1. The executory deviſe of the leaſe, after the death of his wife, to the daughter (unpreferred) was good.

2. That the ſale made by the ſheriff upon the *fiere fac'*, did not deſtroy the executory deviſe.

3. That ſale made of the term by the ſheriff ſtood good, although the judgment was reverſed; and the plaintiff (the daughter) ſhall be reſtored to the value of the term, but not to the term itſelf; and yet the vendee had an abſolute property in the term during the life of the wife. 8 *Co.* 96.

A judgment in *D.* being reverſed in *B. R.* a writ of reſtitution was awarded, and to enquire what were the profits of the land recovered *a tempore judicii* (viz.) 7 *Aug.* 19 *Jac.* And the inquiſition returned, that they amounted to 10 *l.* *Per cur'*—The writ is ill, for it ought not to have been what the profits of the land amounted unto from the judgment, for the plaintiff is not to anſwer the profits longer than from the time of the execution ſued. Then there was a new writ of reſtitution, which was, what profits of the land the plaintiff (who recovered) had taken *colore judicii prædicti*; which was 7 *Aug.* 19 *Jac.* and after the reverſal thereof. *Cro. Jac.* 698.

In order to underſtand how the law is in this point, you muſt obſerve a diverſity between the ſale of a term on a *fieri fac'*, and *extent* on an *elegit*; for the *elegit* is, *quia per ſacramentum* 12 *proborum*, &c. *per rationabile pretium & extentum*, that they appraiſe the goods and chattels of the debtor, and extend his lands; and therefore if they are not appraiſed by the jurors, he cannot ſell them, (as *Dy.* 100. and

ſo

ſo is 4 *Co.* 74. *a.*) Execution by *elegit* ought to be *per inquiſitionem, per ſtat. Weſt.* 2. *c.* 18. which ſaith, *(per rationabile pretium)* which extends to chattels, and *per extentum*, which refers to lands. In *elegit* the goods are to be delivered to the party *per rationabile pretium*; but in *fieri fac'*, the ſheriff muſt ſell the goods. *Keb. Rep.* 566. *pl.* 72.

On an *elegit* the term may not be extended, without ſhewing the certainty of the commencement; for after the debt ſatisfied, the party is to have his term and remainder. But upon *fieri fac'*, the ſheriff may ſell, and his return is general, *quod fieri feci de bonis et catallis*, 4 *Co.* 74. *a.*

Now the ſheriff is to be careful in the ſale of a term on *elegit*, if he make particular recital, that there be no miſtake. But a general recital is better; as,

In *ejectment* it was found by ſpecial verdict, that the ſheriff upon an *elegit* impanelled a jury, who found that the defendant was poſſeſſed of a leaſe for 100 years, which begun at *Mich.* 2 & 3 *Ph.* & *M. ubi revera*, as it was found, it begun *Mich.* 3 & 4 of *Ph.* & *M. cujus quidem* H. *ſtatum intereſſe & terminum in tenementis prædictis prædict' juratores appretiarunt ad* 80 *l.* and the ſheriff ſold it to the leſſor of the plaintiff for 80 *l.*

Now the inqueſt found one thing, and he ſells another, (as this caſe was,) and the ſale not being warranted by the inqueſt, is void. But had the inqueſt found he had been poſſeſſed of ſuch land generally for the term of divers years to come, and they had appraiſed it for ſo much, without ſhewing the certain beginning or determination, it had been well enough; for they ſhall not be compelled to find a certainty, not having means to be informed thereof; or if the ſheriff ſells all ſuch intereſt which the defendant had in the ſame term, the ſale had been good. 5 *Co.* 74. *b.*

The inqueſt on a *fieri fac'* found that the defendant was poſſeſſed of ſuch a term, and miſtook the date, and the ſheriff ſold it; the ſale was not good. And on the new *fieri fac'*, the court directed that it ſhould be found, that he was poſſeſſed of a leaſe for years generally, and yet continuing, and that he ſold it. *Cro. El.* 584. 5 *Co.* 74.

*W.* and his wife, poſſeſſed of a term in right of the wife, as adminiſtratrix to *C. W.* being indebted, granted it to *B.* to the uſe of *W.* and his wife for their lives, and afterwards to the uſe of *B.* himſelf. *W.* is ſued for this debt, and recovery againſt him, and a *fieri facias* being awarded to the ſheriff, he for this debt of *W.* ſold the

term to the plaintiff. *Per cur.*—This grant of the term to the use of the grantor himself is not void *per stat.* 1 *H.* 7. for this grant is not to a void creditor; for the term is in right of the wife as administratrix, and if it had so continued in the hands of *W.* and had never been granted, this was not extendable for the debt of *W.* and if *W.* had it as executor himself, it was not extendable for his proper debt, and fraud shall not be intended except expresly found; therefore the sale is good. *Cro. El.* 292. *pl.* 2.

*W.* had execution out of the *King's Bench*, by *fieri facias*, of a term which was sold by the bailiff of a liberty. After, upon another judgment, the bailiff delivers this term to another, pretending that the first judgment and execution was fraudulent. But *per cur.*—It is not well done; for he is not a judge of fraud, and the court will not allow such pretence to sheriff and offices. *Latch* 53.

If the sheriff extend or sell a lease, this sale shall bind the King (as to his debt) because it is but a chattel, and there was no covin. 8 *Co.* 171.

Upon an execution against the husband for his debt, the sheriff may sell the wife's term during her life. *Co. Lit.* 351. *a.*

If a sheriff on a *fi. fa.* do sell a lease or term of an house, he cannot, and must not put the person out of possession, and the vendee in, but the vendee must bring his *ejectment*. 2 *Show. Rep.* 85.

The plaintiff recovers a debt against the testator in *B. R.* the action was laid in *London*; and after the death of the testator, the plaintiff after judgment in *scire fac'* sues a *fieri fac'* at *London*, upon which the sheriff returns *nulla bona*, by which he sues a *testatum fieri fac'* to the sheriff of *Montgomery* in *Wales*, directed to levy the monies recovered *de bonis testatoris in manibus executoris.*

The sheriff by his return ought not to dispute the jurisdiction of the court, to which he is a minister; but if the court erroneously award process which was not to be awarded, the sheriff ought to obey and execute it; but the party grieved may shew this matter to the court, and pray that they will supersede their erroneous process, and so have remedy.

*Elegit* lies into *Wales*, and so doth execution on a *statute merchant*, and that *breve dom. regis non currit in Walliam* is intended of originals, not on judicials. 3 *Keb. Rep.* 170. *pl.* 6. *Vaugh.* 391. 2 *Mod.* 11. *Bulstr.* 54. *Cro. Jac.* 484. *pl.* 1.

A *capias* on a *fieri fac'* lies into *Wales*. 3 *Keb. Rep.* 170. *pl.* 6.

I

It was the opinion formerly, that a *fieri fac'* on original judgment in *B. R.* doth not lie in *Chester*, *Wales*, &c. but as *Dyer*, the court shall send the record and writ thither. And in action of debt there it may be; but it is granted every day in *Lancaster*, *Wales*, &c. 2 *Keb. Rep.* 410. *pl.* 35.

A writ of execution goes into *Wales*, and 27 *H.* 8. *c.* 26. makes this plain; for by it *Wales* and *England* are annexed. *Plowd.* 200.

So does an extent, or *capias utlegat'*. *Godb.* 214. *pl.* 305.

So do *certioraries* for riots, &c. *Cro. Jac.* 484. *pl.* 1. 2 *Rol. Rep.* 28. *Cro. Car.* 331. *Ventr.* 146.

So does a *ca. sa.* against the bail. 2 *Bulstr.* 55.

And a sheriff fined for not executing it. *Ibid.* 157.

And see the like on a *testatum fi. fa'*. 2 *Saund.* 193. *Hetly* 18. *Cro. Car.* 34, 444. *Cro. Jac.* 484.

An *elegit* will lie into *Wales*, or county palatine. See 3 *Nelf. Abr.* 522. *pl.* 17.

So a *scire fac'* against the heir and tenants. 2 *Mod.* 10.

So a writ of error in real actions, &c. by *stat.* 28 *H.* 8. *Mo.* 248. *pl.* 391. As in a writ of right. *Cro. Car.* 226. A *quod ie deforceat.* Ib. 128. Sid. 138. Lev. 105.

So it seems to lie on an *ejectment*, or other mixt action. *Sed quære*, *Moor* 248.

In all cases where the execution of a judgment, in which the demand is of a thing certain; if the sheriff do this thing, he is not any disseisor. But where the execution is in the generality, without mentioning of any thing in particular, the sheriff ought to make execution of the right thing at his own peril, otherwise he shall be a disseisor; for he is bound to take notice of it, and he had not any warrant from the court to make execution of any but the right thing. As if a man recover in *assize* divers houses, and after the tenant reverseth it in a writ of error, and a writ of execution issues to the sheriff, to put him in possession of the houses which he had lost by the judgment, although the tertenants are strangers to the recovery, and for this they ought not to be ousted without a *scire facias* against them, yet if he do execution by putting them in possession by force of this writ, he shall not be any disseisor, for that he hath the direct authority of the court to do it. *Compl. Sher.* 262.

So in judgment against the casual ejector for 47 houses, and on *habere facias possessionem* the sheriff turns out these 47 tenants, and 80 other tenants, without any process or plea against them. *Per cur.*— We will not grant any writ to supersede the execution against the 80 tenants; for if it should be, it ought to be *quia erronice*, and there was not any error in the proceedings against them, because there was not any proceedings, but they did advise, that every one should bring *trespass* against the sheriff. 2 *Sid.* 155.

If the sheriff do deliver possession of more acres than are in the writ, this makes not the writ erroneous; but in such case action on the case lies against the sheriff for doing it; or an assize against him that hath the possession delivered to him for the surplusage of the land. But if the writ of *hab' fac' possess.* to deliver possession to the plaintiff of lands recovered by him in *ejectment*, contains more acres of land than were in the declaration, the writ is erroneous. *Compl. Sher.* 263.

Trespass lies against the sheriff if he does not execute on the right places. *Keb. Rep.* 278. *pl.* 73. *Yelv.* 228.

If a man brings *ejectione firmæ* of 40 acres of land, and recovers 30, and not the residue; upon the writ of *execution* the sheriff may deliver to him any, *viz.* three or more in the name of all, without setting out the land recovered by metes and bounds, although the plaintiff had not recovered all the acres whereof he had brought this action, and whereof he had supposed the defendant tenant. But if a man be to be put in possession of divers messuages upon a writ of execution, and the houses are in possession of several men, he ought to go to every house particularly, and to deliver seisin of it, and the delivery of seisin of one in the name of all is not sufficient; but he ought to deliver *plenariam seisinam*. Compl. Sher. 263.

On a writ of *formedon* on nontenure of three messuages, the jury found he was tenant of one of the messuages, and not of the other; the plaintiff may have judgment, and a writ to the sheriff to deliver seisin; and the plaintiff at his peril is to shew to the sheriff what messuage it was the jury did intend; for the jury is not tied to set bounds to it. *Cro. Eliz.* 256.

If a writ of *execution* goes to the sheriff, to put a man in possession of 20 acres of land, the sheriff ought to give him 20 acres in quantity, according to the usage of the country where it lies, and not according to the statute. *Dalt.* 531.

If a man recovers rent or common, upon which a writ issues to the sheriff to put him in possession, and the sheriff comes upon the land, and delivers to him seisin of the rent or common by parol, that

that is well made, and the recoverer is in actual poſſeſſion of this. *Dalt.* 531.

If the under-ſheriff delivers poſſeſſion riotouſly on extent on a *ſtatute-merchant*, and the ſheriff refuſeth to return any jury to enquire of the force, and he was an attorney of the *Common Pleas*, the court of *King's Bench*, unleſs the cauſe were depending, cannot take notice of the offence without an information. 2 *Keb. Rep.* 541. *pl.* 1. *Mo.* 462. *pl.* 649.

The recoveror is put in poſſeſſion by *habere fac' poſſeſſionem*, and the defendant ouſts him again; what remedy?

He cannot have a new writ of execution, but is put to his new action, and the filing of the writ is not material; for it is within the election of the ſheriff, whether he will file or return it, or not. But if the execution had not been fully made, as in the execution of an houſe, ſome hid themſelves in the upper rooms, and when the ſheriff was gone, they came down and ouſted thoſe that the ſheriff had put in poſſeſſion before; in ſuch caſe a new writ of *execution* was awarded. By the Chief Juſtice—In the caſe of re-entry, the court may award an attachment againſt him for contempt againſt the court. 2 *Brownl.* 216.

But in *Peviſon* and *Travener's* caſe, the recoveror is put in poſſeſſion by *hab' fac' poſſeſſionem*, and the defendant ouſts him again; if the writ be not returned, the plaintiff ſhall have a new *hab' fac' poſſeſſionem*. *Rol. Rep.* 353. *pl.* 2.

And if *hab' fac' ſeiſinam* be executed, it is good without return; yet the court may command the ſheriff to return it. *Rol. Rep.* 77.

On *habere fac' (ſeiſinam)* the ſheriff cannot return, that another is tenant of the land by right, for that cannot come in iſſue between the demandant and him, and therefore he ought to execute the writ. 6 *Rep.* 52. *Boſwell's* caſe.

On *habere fac' poſſeſſionem*, the ſheriff returned, that in the execution of the ſaid writ he came to the houſe recovered, and removed out all the perſons he could find, and delivered to the plaintiff poſſeſſion, and departed; and ſoon after three perſons, ſecretly lodged in the houſe, expelled the plaintiff. On notice whereof he returned again to the houſe to put the plaintiff in full poſſeſſion; but the others reſiſted him, ſo that without peril of his life he could not do it. *Leon.* 145. *pl.* 202.

On this return the court awarded a new execution. A writ of *habere fac' poſſeſſionem* was directed to the ſheriff; a writ of error was brought,

brought, and a *ſuperſedeas* granted, directed to the ſheriff to ſtay execution; and the *ſuperſedeas* was ſhewed to the ſheriff as he was going to do execution; yet he refuſed to obey it, and did execution notwithſtanding. This is a great contempt in the ſheriff, and the court ordered a writ of reſtitution to be granted. 2 *Bulſtr.* 194.

The ſheriff, in caſes where land is recovered, is to put the party in poſſeſſion and ſeiſin by a twig, clod, &c. of an houſe by the key, &c. of rent by corn or graſs growing on the land, out of which the rent iſſues. 6 *Co.* 52.

It is no good return, that another is tenant of the land by right, or that he has nothing in the land, what returns he may make, or not. *New Ret. Brev.* 320, &c.

Seiſin of the land in one vill, in the name of all the lands in three vills, is good.

Upon an *habere facias ſeiſinam* in dower, the ſheriff returns that he offered her ſeiſin of a third part, (and ſhews it to the court) and that ſhe refuſed to accept it of him. Adjudged a good return, and no *habere facias ſeiſinam de novo.* Dy. 278.

Where upon an *habere facias ſeiſinam*, the ſheriff returned, that the party who ought to take the *ſeiſin non eſt proſecutus breve*, and ſeemed to be good. *Rol. Abr.* 460.

Upon an *habere facias poſſeſſionem*, the ſheriff returns that he was always ready to deliver poſſeſſion, and that the plaintiff never came to receive it.

If the roll be marked for a writ of error before execution done, the ſheriff ſhall be excuſed for doing it before a *ſuperſedeas* delivered, but this is ſufficient to ſuperſede the execution. *Keb.* 12

If a writ of error be brought, and ſhewed to the attorney, if execution proceed, a *ſuperſedeas quia erronice* may go. But in *Noel's* caſe, 2 *Keb.* 33. Error brought and ſhewed to the attorney, is no good *ſuperſedeas* till it be ſhewed to the clerk of the *errors.*

Till the roll marked, or the writ delivered unto the officer in court, writ of error is no *ſuperſedeas*, eſpecially after the return of it. 3 *Keb. Rep.* 191. *pl.* 39.

The party ought to take notice of a *recipitur* upon the record, if it be entered, and if the party takes out execution after the writ of error allowed, it is a contempt, elſe not; and the attorney is not bound to view the record, if a writ of error be brought, but may take

take out execution if there be not a *ſuperſedeas*, or notice given to the party. *Sty.* 105.

It is the duty of the clerk of the errors to mark the roll, and not the attorney. *Style's Rep.* 159.

A writ of error is duly purſued, though the roll be not marked; and if neither the roll be marked, nor notice given to the attorney of the other ſide of the bringing the writ of error, if the party proceed to take out execution, it is no contempt to the court.

The marking the roll, paying for fees, or allowance by the Chief Juſtice of a writ of error, is no *ſuperſedeas*, unleſs actually taken out before execution. *Twiſden* obſerved, error brought and ſhewed to the attorney, is no *ſuperſedeas* until it be ſhewed to the clerk of the *errors*, which is an allowance in court, and therefore if execution be done before it be allowed by the judge, or ſhewed to the clerk of the *errors*, it is well done, becauſe the attorney otherwiſe would never have it allowed, but only ſhewed to the attorney of the other ſide; but if he ſhew it, and declare his intention to have it ſpeedily allowed, there execution is ſuperſeded in the mean time; but yet if bail is not given according to the *ſtatute*, the execution may be well done; which the court agreed. *Keb. Rep.* 33. *pl.* 89.

Formerly, if execution was gone out before a writ of error delivered, or ſhewed to the party, it was not to be a *ſuperſedeas*, unleſs ſhewed to the party, and muſt not foreclose his fine in having it allowed; for if it be not allowed by the court within four days, it is no *ſuperſedeas*; and a writ of error taken out, if it be not ſhewed to the clerk of the other ſide, and allowed to the court, it is no *ſuperſedeas* to the execution. *Mod. Rep.* 112.

The ſheriff makes his warrant to a bailiff to take the body of, *&c.* upon a *ca. ſa.* and before the warrant executed the ſheriff receives a *ſuperſedeas*, and the bailiff having no notice proceeds; yet the arreſt is not lawful, but the bailiff is excuſable in treſpaſs. *Mo.* 677. *pl.*

One purchaſes a *ſuperſedeas*, and does not deliver it to the ſheriff till after the fourth county day, and then he is outlawed, yet the outlawry is void. *Moor n.* 73. *ca. ſa.* was delivered to the ſheriff of *E.* at 11 o'clock, and a warrant thereupon made to the bailiff, four hours after a *ſuperſedeas* comes to the ſheriff, and a warrant upon this *ſuperſedeas* delivered to the gaoler, to ſet the parties at liberty if they were priſoners, who upon it were diſcharged. *Per cur.* —The ſheriff has done well, being the ſame day. *Lit. Rep.* 296.

On a *fi. fac'* to the ſheriff to levy the debt, and the defendant brought error, and had a *ſuperſedeas*; ſo much money as the ſheriff had received before, ſhall go to ſatisfaction, and a *venditioni exponas* ſhall iſſue on it. *Yelv.* 6.

A *ſuperſedeas* as to goods ſeized, is a *ſuperſedeas* as to ſale; but if the ſheriff has received the money, he muſt return it into court. 3 *Keb. Rep* 174. *pl.* 9. and it is not diſcharged by the *ſuperſedeas*. And the caſe was, a *ſuperſedeas* came before execution, but in truth after goods ſeized and before goods ſold, but after the ſheriff had taken ſecurity for the money, and diſcharged the execution; the ſheriff returns that he had received a *ſuperſedeas* out of *Chancery* in the nature of an *audita querela*, it is not good, becauſe the record was not there. *Rol. Abr.* 383.

A priſoner in execution may be diſcharged by parol of the plaintiff, and if the ſheriff detain him after, falſe impriſonment lies.

A *certiorari* delivered to the juſtices of the peace after reſtitution awarded, and before it be executed by the ſheriff, is not a *ſuperſedeas* to the ſheriff, unleſs the juſtices make a *ſuperſedeas* on it, which if they do not, they are finable for the contempt. *Mo.* 673.

By *ſtat.* 16 & 17 *Car.* 2. *c.* 8. made perpetual by 1 *Jac.* 2. *c.* 17. *ſ.* 5. *all ſtays of execution by* ſuperſedeas *on writs of error after verdict, are taken away*; but the other remains as it did.

An *audita querela* is an equitable writ, and not to be allowed without equity.

If one in execution eſcape of his own wrong, he ſhall never have an *audita querela* to diſcharge himſelf, and the gaoler may retake him; but if he eſcape with the conſent of the gaoler, the gaoler cannot take him again; and if he do, the party ſhall have an *audita querela*. *Cro. Car.* 240. *Rol. Abr.* 307.

If the ſheriff arreſts one in execution, and does not return the writ, but ſuffers him to eſcape, and upon the *alias capias* he arreſts him again, an *audita querela* lies. *Mo.* 57. *pl.* 163.

Where two were bound jointly and ſeverally, one was condemned and taken in execution, after the other was ſued, condemned and taken; the firſt eſcapes, the other ſhall not have *audita querela*, for there muſt be ſatisfaction in part. 5 *Co.* 67.

A word that is ſurpluſage ſhall not avoid this writ; the *audita querela* comprehended, that *M.* had recovered againſt the plaintiff in debt,

debt, and that he was taken by *cap' ad ſatisfaciend'* at the ſuit of *M.* by the ſheriff of *G.* who let him go at large, and on iſſue upon the voluntary eſcape it was found for the plaintiff. And it was moved, the writ of *audita querela* was not good, for the words are, that the plaintiff *capt. fuit. vertute brevis noſtri judicialis*, and this word *judicialis* is not in the regiſter, but only *brevis noſtri de capiendo*; yet adjudged good. *Leon.* 73.

An *audita querela* on eſcape of the teſtator's creditor, and a recovery againſt the marſhal. Defendant *proteſtando*, that the plaintiff eſcaped after the defendant recovered againſt the marſhal, and the plaintiff did not pay the marſhal, *abſque hoc* that the marſhal ſatisfied and paid the teſtator. This caſe differs from all others of eſcape by conſent of the gaoler, this being not purely debt which goes over to executors, but is grounded on a tort general by the death of the gaoler: the court concluded, that recovery againſt non-payment to the marſhal, was no diſcharge of the plaintiff in this *audita querela*. But adjourned, to take iſſue on payment by the marſhal to the creditor, *viz.* the defendant's teſtator. 3 *Keb. Rep.* 763. *pl.* 54.

One was outlawed in debt, and taken on the *capias*, and committed to the *Fleet*, and the warden ſuffered him to go at large voluntarily; and after the executor of the plaintiff in debt takes him in execution gained upon a new writ, and upon this he brought *audita querela*, and ſhews this matter, and outlawry in the plaintiff in the *audita querela* was pleaded *Per cur.*—It is a good plea, becauſe this writ is not directly to reverſe the outlawry (as error is) but is founded upon a tort, *(ſcil.)* on the eſcape, and not on the record only; otherwiſe in error or attainder. Outlawry is no plea; nor is there any difference as to this caſe, where the outlawry is at the ſuit of the defendant, or of a ſtranger. See other good reaſons, *Sid.* 43.

If on an *elegit* the ſheriff takes an inquiſition, and there are found ſeveral lands ſubject to the *extent*, and found of the ſeveral values; and the ſheriff returns he had delivered ſome of the ſaid lands in particular for the moieties, where it appears, that according to the values found an equal moiety is not delivered to the party who recovers, more than a moiety; this is not void, neither is it a *diſſeiſin* by the entry, but only voidable by an *audita querela*.

If *A.* recover againſt *B.* debt or damages, and an *elegit* is granted to the ſheriff to extend the moiety of his land, which is *antient demeſne*, although it be admitted that this is not extendable, yet *B.* may not avoid this by entry without an *audita querela*, becauſe the ſheriff had a warrant to deliver the moiety of half his land, and this was his land, therefore not void. *Hob.* 47. *Danv. Abr* 629. *pl.* 5, 660. *pl.* 21. 3 *Danv. Abr.* 306. *pl.* 4. *Brownl.* 234. *Mo.* 211. *pl.*

An *elegit* is a judicial writ given by *ſtat W.* 2. *c.* 18. either upon a recovery for debt or damage, or upon a recognizance in any court. By this writ the ſheriff ſhall deliver to the plaintiff, *omnia cattalla debitoris (exceptis bovus & aſris carrucæ) & medietatem terrarum*, and this muſt be done by inqueſt taken by the ſheriff, for the valuation of the goods and lands ought to be firſt found by the inquiſition of a jury. *Stat. W.* 2. *c.* 18. gives the *elegit*, ſo that in an *elegit*, the ſheriff may take in execution the moiety of the land of the coniſor, *&c.* and all his goods and chattels, (except as aforeſaid,) and was to deliver them to the coniſee, or he who recovers, upon a reaſonable extent or price, until the debt be ſatisfied, and the ſheriff ſhall deliver him the ſeiſin of the land, and he is called tenant by *elegit*, and ſhall do no waſte. 3 *Co.* 12. 4 *Co.* 47.

The *elegit* as to goods, is in effect but a *fieri fac'*; and therefore if there be no lands, and execution be on goods, and they are not ſufficient, he may have a *capias*; otherwiſe if lands be extended.

One prayed to have an *elegit*, and the ſheriff returned he had no lands, and he prayed a *capias*, but the court granted it not; the cauſe is the entry in the roll is, that he has choſen the execution of the moiety of the lands which he muſt ſtand to. 13 *Ed.*

*Note.* The law is not ſo now, for if the ſheriff returns *nihil*, the party may have a *capias*. Hob. 57.

All the goods and chattels, in which are included leaſes for years, ſhall be extended, (except oxen and beaſts of the plow) the moiety of the lands.

A *rent-ſeck*, where there is not any reverſion, cannot be delivered *et liberum tenementum*. Cro. Eliz. 656. *pl.* 20.

Fee-farm rents are extendable upon an *elegit*, and yet the words of the ſtatute, which give the ſheriff authority, are only land, *medietatem terræ*. Arg. 10. Mod. 526.

Since *ſtat. quia emptores terrarum*, if a man gives land in fee, reſerving a rent, it is a rent-ſeck in a ſubject, becauſe a tenure cannot be created at this day, and every fee-farm rent, when granted by the King, becomes rent-ſeck, and therefore not to be extended. *Arg.* 9. *Mod.* 72.

An annuity certain is extendable by *elegit*. *Cro. Jac.* 78. *pl.* 10.

Lands in *ancient demeſne* may by delivered in execution by the ſheriff by force of an *elegit* out of the King's court, for the land itſelf was never put in plea directly in the King's court. 5 *Co.* 105. *Hob.* 47. *pl.* 53. *Brownl.* 235. *Mo.* 211. *pl.* 351.

If

If the lands descend to an infant, the sheriff shall cease to extend.

Lands entailed in the hands of an heir, are not extendable on an *elegit* or statute. *Cro. Jac.* 85.

If the inquisition in *elegit* be void in any part, it is void in the whole, and the whole must be quashed; and not *quoad* that only; so if more than a moiety be delivered on the *elegit*, it is void for the whole. 2 *Keb. Rep.* 582. *pl.* 119. *Sid.* 91.

It was moved in the said case of *Harris*, to quash an inquisition of *elegit* upon judgment in *B. R.* because it appears not in what county the lands extended were; but *Monmouth* being in the margent, and directed to the sheriff there, and the return made by him, it shall be intended in *Monmouth*. 2 Keb. Rep. 582. *pl.* 119.

On a writ of *extendi facias* on a statute, if the sheriff impanel a jury, and they deliver the verdict to the sheriff in writing, they may after make it more formal, but cannot alter it in substance; for it is a compleat verdict by delivery of it to the sheriff. 2 *Rol. Abr.* 712.

An *elegit* recites the judgment, *quoad elegit executionem* of the goods, and of a moiety of the lands; and the writ was, *Ideo tibi præcipimus quod bona & cattalla* of the defendant's, *quæ habuit die judicii prædicti redditi deliberari fac'*, omitting these words, *& medietatem terrarum & tenementorum prædict', tenend.* the said goods and moiety of lands, *quousque debitum levetur*, by virtue whereof the sheriff delivered the moiety in execution. *Per cur.*—This shall not be amended, and he ought to have a new *elegit*; because the inquisition was taken without warrant, the sheriff having no warrant to extend those lands. *Cro. Car.* 162.

Two inquisitions, taken at several days by several juries upon one *statute merchant*, were adjudged naught; one was taken of the land, and the other for the lands and goods. *Brownl.* 38.

A lessee had a lease of the value of 100 *l.* and after the *teste* of the *elegit*, and before the sheriff had executed the *elegit*, assigns his term to one, who assigns it over to the plaintiff in the *scire fac'*; and afterwards the sheriff executes the *elegit*, and delivers the lease to the plaintiff, *tenend'*, *&c.* for the satisfaction of the debt, which came but to 43 *l.* 6 *s.* 8 *d.* *Per cur.*—The sheriff could not deliver the lease at another value than what the jury had found it at. And the sale made by the sheriff is as strong as if it had been made in open market, and all the goods and chattels are bound after the *teste* of the *elegit*, and cannot be sold by the owner after. *Brownl.* 38.

On

On *elegit* there needs no *liberate*; otherwise on a statute. *Mar.* 117.

In every *elegit* the sheriff must return and set out the moiety distinctly, unless they be tenants in common, and in that case he must return the special matters. *Brownl.* 38. See *Comb.* 217.

On inquisition of a lease which is but a chattel, the sheriff may sell it as goods; but if he extends it, there shall be no other benefit than as of a common *extent*. Id. ib.

Two persons recovered severally against one in debt: he who had the first judgment sued first an *elegit*, and the sheriff prayed the advice of the court. *Per cur.*—He shall deliver but the moiety of that moiety which he had at the time of the writ awarded. *Cro. Eliz.* 482.

*S. H.* acknowledged two judgments in debt to *A.* upon bond, and was bound to *F.* in a bond, bearing date before the judgments. *F.* assigns his debt to the King. *A.* takes out execution upon his judgment, *viz.* two *elegits*; by one he has one moiety of *H*'s lands, by the other the other moiety: then process issued out of the *Exchequer* for the debt assigned to the King. *Per cur.*—It was resolved,

1. The subject's title is *prior* to the King's, and the King is bound by *stat.* 33 *H.* 8.

2. The two *extents* are well executed; because both judgments are in one and the same term, and no priority between them. *Hard.* 23.

Actual possession ought not to be delivered on *elegit*, the sheriff ought only to deliver seisin to enable the plaintiff to maintain an *ejectment*, and the tenant may plead on the *ejectment*, else the tenant would be turned out unheard, and be remediless; yet if actual possession be delivered, it is remediless. 3 *Keb. Rep.* 243. *pl.* 61.

In *elegit* the sheriff ought to deliver the moiety by metes and bounds. *Hut.* 19.

If the land be first executed on a *statute*, and afterwards an *elegit* on a judgment obtained before the acknowledging of the statute come also to the sheriff, the moiety of the land extended shall be delivered to the plaintiff upon the judgment. *Brownl.* 30.

*Note* the practice is for attornies not to award *elegits* on the roll. *Comb.* 232.

If a man sue an *elegit* on a recovery, and the sheriff return, that he made partition of the lands of the defendant by twelve jurors; but

he could not deliver the moiety to the parties according to the writ, becauſe all the land was extended to another upon a ſtatute: he may after have a *ca' ſa'*, for this return is all one with a *nihil* returned. *Cro. Eliz.* 160. *pl.* 50. *Hob.* 57. *Leon.* 176. *pl.* 247.

If one pray an *elegit*, and this entered on record *in banco*, and takes out the writ; and before the return of it the record is removed into the *King's Bench*, where the judgment is affirmed within the year, and after it is affirmed to the court, that the ſheriff had returned his writ *in banco*; yet the plaintiff may have a *capias*, for that this allegation does not appear to the court; and now it is impoſſible it can be returned here, and ſo it is ſtronger than if a *nihil* had been returned. See 2 *R. Raym.* 1451.

It was queried, if on *elegit* the ſheriff ought to return the extent; and alſo that he hath delivered the lands. *Per cur.*—An *elegit* needs not be returned. Therefore if the ſheriff by force of an *elegit* delivers to the party the moiety of the lands of the defendant, and does not return the writ; if now the plaintiff will bring an action of debt *de novo*, the defendant may plead in bar the execution aforeſaid, though the writ of execution was not returned. *Leon.* 280. *pl.*

On an *elegit*, if the ſheriff deliver more than a moiety, the execution is void. 2 *Salk.* 563. *pl.* 2. *R. Raym.* 718. See *id.* 346.

The ſheriff returns on *elegit* that the party had not any lands, but only within the liberty of *St. Edmundſbury*, and that *J. S.* bailiff there, hath the execution and return of all writs, who enquired and returned an *extent* by inquiſition, and that the bailiff delivered the moiety to the party, and the plaintiff by virtue of that *extent* entered.

*Per cur.*—1. The bailiff may make ſuch inquiſition by warrant from the ſheriff.

2. When a jury by the inquiſition find the ſeiſin and value of the lands, the jury ſhall extend all the land; and the bailiff in a franchiſe, and the ſheriff where there is none, ſhall deliver the moieties, and not the jury. *Cro. Car.* 319. *pl.* 13.

On an *elegit*, averring no goods were ſeized, it hath been held no *ſcire facias* lies; but upon a *fieri fac'* bare ſeizure is an execution. 2 *Keb. Rep.* 789. *pl.* 27. 821. *pl.* 32.

It was found by inquiſition on *elegit*, that the defendant was ſeized of the moiety of a meſſuage and lands for life, and other lands in the right of his wife; the ſheriff returns, *quod virtute brevis*, &c.

*&c. deliberai feci medietatem omnium præmiſſorum, videlicet, medietatem medietatis unius meſſuagii necnon duo pomar' necnon unum clauſum.* The *elegit* was filed; the return is not good; the ſheriff ought to have delivered to him the moiety of the lands jointly, ſo that the tenant by *elegit* may be tenant in common of a fourth part with the joint-tenants. But by this delivery in ſeverality, he had in effect but the eighth part; for the other joint-tenant may occupy the land delivered with him in common: if it had been *duorum pomariorum*, it had been good. And he cannot have a new *elegit* properly, but the plaintiff ſhall make a ſurmiſe that the ſheriff *male ſuggeſſit* in the execution of the *elegit*, and then he ſhall have a new one at his peril. *Latch* 77.

An *extent* on a ſtatute-merchant. The plaintiff put the coniſee in poſſeſſion of parcel of an houſe and lands, and ſuffered the coniſor to continue in the reſt of the houſe, by reaſon whereof the coniſor kept the poſſeſſion of the whole, and held the coniſee out. The coniſee, to the intent he might have a full and perfect poſſeſſion of the whole, cauſed the ſheriff that he did not return the writ of *extent*, on which it is entered on the roll, *quod vicecomes nihil inde fecit nec miſit breve*; an *alias breve extendi facias* may well be awarded. And the ſheriff cannot return, that the land was formerly extended by the old ſheriff, becauſe by the entry on the roll it appears that no execution was done; but if the entry be not, the ſame is an execution for the party, though it be not returned. 2 *Leon.* 12. *pl.* 20.

After one *elegit* returned, they cannot have another *elegit* without continuances. *Per cur.*—The courſe is not to make continuances in the roll, but awards ſeverally. *Per cur.*—If *nihil* be returned, he may have a new *elegit*; but if an acre be returned, he can have no other. *Keb. Rep.* 91. *pl.* 74.

If a ſheriff takes inquiſition on *elegit*, the plaintiff may enter immediately before the return of it. *Rol. Abr.* 738.

Where the ſheriff returns *nihil* as to goods and chattels on the firſt *elegit*, yet on the ſecond *elegit* a leaſe for years was taken in execution though the ſuggeſtion for the ſecond writ was of lands, and nothing of chattels. *Mo.* 341. *pl.*

On *elegit* the ſheriff returned, that he had delivered to the plaintiff goods and chattels of the defendant's *ad valentiam* 20*l. per rationabile pretium*, and ſhewed what the goods were in certain; and alſo that he had delivered 20 acres of land of the defendant's, *quæ eſt medietas omnium terrarum per rationabile extentum*, but returned no inquiſition, *ſcil. per ſacramentum* 12, *&c. Per cur.*—There ought to be inquiſition, and the ſheriff himſelf cannot extend it. *Dy.* 100.

A plaintiff declares where the defendant had seized goods of *J. S.* by virtue of an *elegit*, sued by the plaintiff, and delivered to the defendant, being deputy sheriff, he in consideration that the plaintiff, at the request of the defendant, would prosecute another *elegit*, and deliver to the defendant, and authorize some person to receive the goods to be found by the inquisition, and to deliver the goods to the person authorized. *Per cur.*—The promise is not lawful; the seizing of the goods by the first *elegit* was not good, for want of an inquisition, and it differs from a *fieri fac'*: so that the defendant is a trespasser *ab initio*, and this promise is to make good his tort, and the sheriff must return a jury differently, and this promise engages him to the contrary; and one part of the promise being unlawful, makes all vicious. 2 *Jo.* 24. *Cart.* 223.

A new *elegit* issued on suggestion, that the party had other lands in the same county; for if it appeared that one takes part of the land upon delivery of the sheriff, and accepts it, he cannot after take a new extent; and if he does, it is wholly void, for then the record is ended, and the attornies of both parties are out of court: but if it is found that he came into court, and surmised that the party had other lands in the same county, and prayed a new *elegit*, he shall have it; for this is intended the first day of the *extent* returned, and then it is reasonable he may have it, and pray a new *extent*, for he never accepted of the first. *Mo.* 241. *Cro. Eliz.* 310.

After a full and perfect execution had by *extent*, and returned of record, there shall never be any re-extent upon any eviction; but if the *extent* be insufficient in law, there may go out a new *extent*; as an *elegit* issued out against *G.* Esq; who at the time of suing the writ was baronet, it was insufficient since *stat.* 23 *H.* 8. *cap.* 5. *Co. Lit.* 290, *&c.*

If more than a moiety be delivered on the *elegit*, it is void for the whole. *Sid.* 91. *pl.* 12. See 10 *Vin. Abr.* 594. *pl.* 21.

The sheriff may extend or sell a lease, and this sale shall bind the King, because but a chattel, and no *covin* in the case. Judgment in debt against joint-tenant for life, who releases to the other and dies. The plaintiff sues *elegit*. *Per cur.*—The release, being his own act, shall not discharge his moiety of the execution, for by the acceptance of the release he has deprived himself of the *jus accrescendi*. 7 *Co.* 78.

A rent-seck (where there is not any *rediſſeiſin*) cannot be delivered *ut liberum tenementum.* Cro. Eliz. 656.

Annuity certain is extendable by *elegit*. *Cro Jac.* 78.

Where the ſheriff extends a manor by the name of acres, land, meadow, wood, no advowſon paſſeth. *Ow.* 4.

On recovery in *C. B.* againſt *G.* the plaintiff prays *elegit* to the ſheriff of *London*, where the action was brought, and to the ſheriff of *Lancaſter* (as the courſe is) by *ſci' fac'* directed to the chancellor of the *county palatine*; and this *elegit* appears to be grounded upon a *teſtatum*, firſt made by the ſheriff of *London*, that *G.* had nothing in *London*, *ubi revera* they never made ſuch return; and upon this the ſheriff returned that he took a leaſe of tithes, which the ſheriff delivered to the plaintiff, as the goods and chattels of *G.* for the debt, and that *G.* had not *plura bona*, *&c.* *Per cur.*—No return being made by the ſheriff of *London*, and it appearing that no *teſtatum* was ever awarded, it is error; for the plaintiff in *B. C.* might have taken his *elegit* immediately into *London* and into *Lancaſter*, yet he hath waived this benefit, and grounds his execution upon a *teſtatum* which is falſe: and now *G.* ſhall be reſtored to his term again; for the ſale and delivery of the leaſe to the party himſelf on an *elegit*, is not by force of the writ, and it is in law but a bare delivery in *ſpecie*, and upon reverſal ſhall be reſtored in *ſpecie*, and doth not alter the property abſolutely, but attends the goodneſs or illneſs of the execution. But if the ſale had been to a ſtranger for 100*l.* though the value had been 1000*l.* yet upon reverſal he ſhall not have the term, but the money, for it is the folly of the party that he did not pay the judgment. So on ſale by *fi' fac'*, the term ſhall never be reſtored. *Cro. Jac.* 246. *Yelv.* 179. *Yelv.* 180.

If no return be on *elegit*, the party after the year and day ſhall have a *ſci' fa'*, and after this a new *elegit*. Mo. 24. pl. 83.

If the goods and chattels of the King's debtor be ſufficient, and ſo can be made appear to the ſheriff, whereupon he may levy the King's debt, then ought not the ſheriff to extend the lands of the debtor or his heir, or of any purchaſer, or tertenant.

If one extends a *ſtatute ſtaple* at the ſuit of *A.* the ſheriff extends the lands, and takes the goods, and ſeizes them into the hands of the King, but does not make livery, and after a writ of *prerogative* of the King's iſſues out of the *Exchequer*, and commands the ſheriff to levy the King's debt of *B. (viz.)* 100*l.* of the goods of the debtor, and if he had not ſufficient, then to extend his lands; and this is delivered to the ſheriff after the firſt *extent*, but that was not returned. The ſheriff in this caſe ought to execute the *extent* for the King's debt, becauſe the property of the goods and lands were not in *A.* before they were delivered to him by a writ of *liberate*, and the goods, being ſeized into the hands of the King for the uſe of the party, were privileged from all other executions but that of the King only. 2 *Rol. Abr.* 158. *Dy.* 67. *Hob.* 339.

Where

Where the officer without any warrant or authority ſhall levy any duty for the King, and ſhall after account for the ſame in the *Exchequer*, or otherwiſe pay the ſame to the King's uſe, there the officer ſeems chargeable but as a treſpaſſer; but if he ſhall convert the ſame to his own proper uſe, it is felony.

If a man be bound in a *ſtatute merchant*, (and does not pay the debt at the day) execution thereof ſhall be done in this manner: the coniſee muſt come to the mayor, or other officer, before whom the ſtatute was acknowledged, and pray him to certify the ſame into the *Chancery*, under his ſeal, *&c.* and if he will not certify it, then a writ of *certiorari* muſt be ſued forth of *Chancery*, directed to the ſaid officer, to certify the acknowledgement of the ſaid ſtatute into the Petty-Bag Office in *Chancery*, and upon the certificate a writ of execution; *ſcilicet*, firſt, a *capias* ſhall go out to the ſheriff againſt the body of the coniſor, *(ſi laicus ſit.)* but the debtor, after he is taken, hath liberty given him (within a quarter of a year) to ſell his lands and goods to diſcharge his debts; and if he do not agree for his ſaid debts within the next quarter, or if he cannot be found, then all his lands and goods upon an *extendi facias* ſhall be appraiſed by a jury, and ſhall be delivered to his creditors by a reaſonable time, to hold till the debt be fully paid: and yet the body of the debtor, if he be taken, ſhall remain in priſon until the debt and damages be paid. And this writ may be returnable into the *C. B.* or *B. R.*

Though it be within a franchiſe, the ſheriff is to execute it himſelf.

If the ſheriff return, that the debtor is a clerk, then an *extent* ſhall go out againſt his lands and goods only.

If the debtor find ſureties, they ſhall be ordered in all things as the principal; *ſcilicet*, as to the arreſt of their bodies, and delivery of their land and goods.

The ſtatute ought to be ſhewed to the court where the *certiorari* is returned.

The creditor, out of the profits of the land, is to find the debtor bread and water in priſon.

A *ſtatute ſtaple* is of two ſorts:

1. *Per ſtat.* 26 *Ed.* 3. *c.* 9. *& ſic propriis dicitur*, and is acknowledged before the mayor of the ſtaple.

2. *Per ſtat.* 23 *H.* 8. *c.* 6. before one of the chief juſtices, or befor the mayor and recorder of *London.*

A *ſtatute ſtaple* muſt be certified in *Chancery* as a *ſtatute-merchant*, and on that certificate execution ſhall go preſently forth againſt the body (*ſi laicus ſit*) and the lands and goods of the coniſor returnable into *Chancery*, in the Petty-Bag Office there, and not into *B. C.* or *B. R.* as a *ſtatute merchant.*

The ſheriff on this ſhall take the body of the coniſor, and *per ſacramentum proborum, &c.* preſently extend, and prize and ſeize into the King's hands his lands, goods and chattels, and ſhall certify the appraiſement into *Chancery.*

Upon which the coniſee ſhall have a *liberate* to the ſheriff, to deliver theſe lands and goods to the value of his debt, and ſhall not be delivered to him by the ſheriff before the *liberate.*

By force of the writ on the *ſtatute merchant*, the ſheriff may deliver the lands and goods preſently upon the extent of the party. But by the writ on a *ſtatute ſtaple*, or recognizance, in the nature of it, he is to extend the lands and goods, and to ſeize them into the hands of the King; but not to deliver them to the party without a *liberate.*

The proceedings in a *ſtatute merchant* is a *capias*, and if the ſheriff thereupon return a *cepi corpus*, then he ſhall remain in priſon a quarter of a year, within which time he may ſell his goods and lands to pay his debts, and this by the expreſs words of the ſtatute of 15 *H.* 7. *c.* 16. but if the ſheriff return, *non eſt inventus*, execution ſhall be granted of his lands and goods.

In a *ſtatute ſtaple* and recognizance, the firſt proceſs is to take his body, lands and goods, all in one writ; for this is by the expreſs words of the ſtatue, and is a more ſpeedy remedy than the *ſtatute merchant.*

On a *ſtatute ſtaple* and recognizance, the writ of execution, on return of the coniſor dead, is to extend the lands *nec non catalla*, which were of the coniſor at the time of his death: and this is the conſtant courſe, as appears by records of *extents* which are in the rolls.

On extent of a *ſtatute merchant*, the ſheriff returns, that the body cannot be found, and that he had extended the lands, and delivered them to the plaintiff. *Reg.* 146.

The ſheriff may return *non eſt inventus, nec habet bona nec terras*: the ſheriff returned the coniſor *mortuus.* Dy. 299.

the

On extent of a *ſtatute merchant*, or *ſtaple*, the ſheriff may return, that the debtor is clerk. If he return *tarde*, or *mandavi ballivo libertatis*, he ſhall be puniſhed.

Lands in ancient demeſne ſhall be taken in execution on a ſtatute, but not on copyhold lands. 4 *Co.* 67. 5 *Co.* 105.

Where the debt of the coniſor appears in the return, there of neceſſity his ſeiſin muſt be found to be of an eſtate in fee-ſimple only. *Dy.* 299.

Execution upon recognizance *per ſtat.* 32 *H.* 8. *c.* 6. has the effect of a *ſtatute ſtaple*.

An extent on a *ſtatute merchant* iſſued out againſt *R.* the coniſor; the ſheriff returned, that the coniſor was poſſeſſed of divers goods, and ſeiſed of lands, which he delivered to the coniſee, and that the coniſee accepted of the lands; and becauſe the ſheriff did not return, that he had not any other lands, goods, or chattels, it was adjudged inſufficient, and a new writ awarded; though ſome held it was well enough in the caſe of a coniſor, but not in the caſe of a purchaſer. *Brownl.* 37.

If the ſheriff do not return the *capias*, or return *tarde*, or that he directed it to a bailiff of a franchiſe, he ſhall be puniſhed, and yield damages to the party aggrieved, according to the ſtatute *de Mercatoribus*. *W.* 2. *c.* 39.

Two inquiſitions taken at ſeveral days by ſeveral juries upon one *ſtatute merchant*, were adjudged naught; one was taken of the lands, and the other for the lands and goods, *Brownl.* 38.

If another had theſe lands in execution by *elegit*, or is in by diſcent; in ſuch caſes the ſheriff ſhall return the ſpecial matter, *i. e.* in the firſt caſe, that he hath extended the land of the defendant; but he cannot deliver the ſame to the plaintiff, for that another had the ſame in extent before.

The ſheriff, having an extent upon a ſtatute, may gather the goods all into one place to be viewed and appraiſed by the jurors, and he is not a treſpaſſer. *Mo.* 563. *pl.*

If lands delivered in execution (on a *ſtatute merchant*, ſtaple or recognizance, or upon recovery of debt and damages) are lawfully recovered or evicted out of the poſſeſſion of the coniſee, before his debt and damages be ſatisfied, he ſhall have *ſcire fac'*, *&c.* and upon this a new writ of *execution* or *re-extent*, to levy the reſidue, *per ſtat.* 32 *H.* 8. *c.* 1. *Co. Lit.* 289, 290. 5 *Co.* 87.

A *ſcire*

A *ſcire facias* is a writ judicial, directed to the ſheriff, *&c.* and is uſually to warn a man to come and ſhew cauſe to the court, *&c.* why execution of a judgment ſhall not be done. But this writ ſhall not be granted before the year and day paſt, after judgment given.

If a coniſor in a recognizance dies, *ſcire fac'* goes againſt his executors, *&c. hæredes terrarum, &c.* ſheriff returns that he had no executor; *& ſcire feci* W. H. *filio & hæredi prædict.* M. *(le coniſor.)* This return agrees not with the writ, yet it may be good. 3 *Co.* 15.

A *ſcire fac'* on a recognizance in *Chancery* againſt *C.* who was returned dead, then a ſecond *ſcire fac'* iſſued againſt the heir of *C.* and againſt the tenants of the lands of *C.* which he had *tempore recognitionis vel poſtea.* The ſheriff returned *C.* tertenant, and omitted to return any thing againſt the heir. This is a non-return of the ſheriff, and not a miſ-return, and is not aided by any of the ſtatutes of 32 *H.* 8. or 18 *Eliz.* or 21 *Jac.* of *Jeofails.* It is error; the tertenant, without the heir, ought not to be charged: therefore the heir ought to be ſummoned, for the heir may have a releaſe to plead, or other matter to bar the execution. Alſo if the heir be within age, the parol ſhall demur, and the tertenant ſhall have advantage thereof. And a new *ſcire fac'* iſſued *ad infarmand' curiam*; and the return was, that he had not any lands in his bailiwick that deſcended to his heir, nor any heir within his bailiwick: and good enough, though it had been better if he had returned who was heir, and that he was warned, or that there was not any heir in the ſaid county. *Cro. Car.* 295. *pl.* 4. 11 *Vin. Abr.* 19. *pl.* 18.

The writ commands the ſheriff to give notice to the tertenants of the land in fee-ſimple, and the ſheriff returns not, that thoſe which he had not returned were tenants of the land in fee-ſimple; and ſo the words of the writ are not anſwered. *Brownl. Rep.* 145, 146.

The ſheriff may return 24 tertenants of the whole, and every tenant may plead in diſcharge of himſelf; or he may return, that each is tertenant of ſo many acres. 2 *Keb. Rep.* 601. *pl.* 26.

A *ſcire fac'* to have execution on a recognizance. The ſheriff returns the coniſor dead; other *ſcire fac'* iſſues againſt the tertenants of the coniſor, on which the ſheriff returns a *ſcire feci* to *W.* and *R.* tenants; and further, that there was no heir, nor any other tenants, *quibus ſcire fac' poterit, & la forme.* 2 Keb. Rep. 621. pl. 12. Gouldſb. 45. pl. 26.

A *ſcire facias* againſt the heir and tertenants. The ſheriff returns no heir, and the tertenants appear, *& la form.*

A *ſcire facias* to tertenants. The ſheriff returns they are ſummoned, *la forme*. 2 Saund. 6, 8. 232.

A *ſcire fac' ad audiend' errores*, muſt be delivered to the ſheriff. *Rol. Rep.* 329.

If a ſpecial *ſcire facias* do iſſue forth, a *nihil* cannot be returned upon it, for *nihil* is a general return, and the writ is ſpecial.

The return of the ſecond *ſcire fac'* ought to bear date on the return of the firſt *ſcire fac'*.

Two *nihils* returned, countervail *ſcire fac'*.

To *ſcire fac' ſur recogniſans*, ſheriff returns, that the defendant is dead.

A *ſcire fac' vid.* tertenants. The ſheriff returns they are ſummoned. 2 *Saund.* 8.

On motion againſt under-ſheriff *Greenaway*, for not returning a *ſcire facias*; and it was inſiſted, that being returnable at a return day, and not at a day certain, he need not return it till 4° *die poſt.* So the court did nothing. *Forteſc. Rep.* 363.

He which is ſued in a perſonal action, if he do not appear on the mean proceſs, then the *exigent* is directed to the ſheriff to call and proclaim him in five county-court days, one after another, to anſwer to the law; and when upon the *exigent* the ſheriff returns *quod non comparuit*, upon his return the plaintiff ſhall have a *cap' utlegatum* againſt the defendant; but if the defendant appear upon the *exigent*, he ſhall have a *ſuperſedeas*.

Where on the *exigent* the ſheriff returneth *reddidit ſe*, he muſt have the body in court at the day of the return, except the party be ſick.

The ſheriff may return the coroners were abſent.

A *capias utlegatum* is a *non omittas* in itſelf, and therefore the bailiff of a liberty cannot execute a *cap' utlegat.* and if the party be in the hands of the bailiff, the ſheriff may take him.

If a *capias utlegatum* iſſues to the ſheriff to take the party, and to enquire what lands and tenements he had, the ſheriff finds by inquiſition that he is ſeiſed of many lands, and continues poſſeſſion in them, he cannot put the party out of poſſeſſion by force of that. *Winch.* 78.

An

An outlawry returned in *London* in theſe words: *ad huſting. tentum in* Guildhall *civitatis* London *tali die* A. B. *exactus fuit & non comparuit.* This is no good return, becauſe there are two huſtings in *London*; one is *de communibus placitis*, and the other is *de placitis terræ*: in ſuch caſe the return muſt be, *apud huſting de communibus placitis.*

The city of *Norwich* is within the county of *Norfolk.* Alſo it is a county in itſelf, which may hold plea; and therefore if a return be made in theſe words, *ad com' tentum apud Norvicum in com' Norfolc'*, this is not good, for that it may have two intendments, *(ſcilicet)* that the county which was held there was for the city, or for the county of *Norfolk.* But if the return be in theſe words, *ad comitatum Norfolc' tentum apud Norwicum in comit' Norfolc'*, it is good, for now it cannot be intended, but only that their county was held for the county of *Norfolk.* 11 *H.* 7. 10 *b.*

In a *cap. utlegat.* the ſheriff returned, that the party who was arreſted had a protection from a peer of parliament, it is ill; and day was given to the ſheriff to amend his return. *Winch.* 24.

Proclamation was directed to the ſheriff of *Cheſhire* againſt *J. H.* and the writ was returned, *tali die ad comit' meum tent' en le ſhire-hall, &c. proclamationem feci ac ead. die ad general' ſeſſion', &c. proclamationem feci*; and this matter was pleaded in avoidance of the outlawry to reverſe it, becauſe the proclamations were made one day, and the writ was *tribus ſpecialibus diebus, &c.*

*Per curiam*—It is an ill return, and the ſheriff was amerced for it. *Goldſb.* 111.

By the cuſtom of *London* the writ was directed to the ſheriff of *London*, and not to the coroner, (who is mayor.)

The return of the outlawry out of *London* in *B. R.* is generally made without ſaying, *per judicium coronat'.* 2 Rol. Abr. 806.

In error to reverſe an outlawry in the county of *Lancaſter*, for that the ſheriff returned, *quod ad com' Lancaſtriæ tent. ibid.* where it ſhould have been, *Ad com' Lancaſtriæ tent. apud Lancaſter*, or at ſome other place certain, and it was reverſed. 9 *Co.* 94. *Dy.* 105.

The *exigent* was returned, *ad com' tent. apud caſtrum de Exon' primo exactus fuit, &c.* and becauſe it was not ſet down in what county, it was held to be erroneous. One was returned outlawed, and for that it did not appear that it was *per judicium coronatorum*, it was reverſed, and that without any writ of error.

The

The judgment is, *ideo utlegat' coronator', &c.* Inſt. 288.

The profits of lands of the perſons outlawed, in perſonal actions, the ſheriff may ſeize without any officer, and alſo the goods.

"No perſon outlawed in the *King's Bench* for any cauſe, (treaſon and felony excepted) ſhall be compelled to appear in perſon, but may appear by attorney, and reverſe the ſame without bail, except where ſpecial bail ſhall be ordered by the court." 4 & 5 *W. & M. c.* 18. *ſect.* 3. 2 *Stra.* 1178. 12 *Mod.* 349.

So that a perſon outlawed (except as aforeſaid) may now appear by attorney, and then ſome friend, or his ſaid attorney, muſt undertake to pay the fine and his fees, and then the outlawry may be reverſed. But it is held, that this act does not extend to a reſcue returned, *&c.*

"No goods upon any tenements leaſed ſhall be taken by any execution, unleſs the party, at whoſe ſuit the execution is ſued out ſhall, before the removal of ſuch goods, pay to the landlord of the premiſes, or his bailiff, all money due for rent for the premiſes, provided the arrears do not amount to more than one year's rent; and in caſe the arrears ſhall exceed one year's rent, then the party at whoſe ſuit, *&c.* paying the ſaid landlord or his bailiff one year's rent, may proceed to execute his judgment; and the ſheriff is required to levy and pay to the plaintiff, as well the money paid for rent, as the execution money." *Stat.* 8 *Ann. c.* 14. *ſect.* 1.

The executor of a landlord, after the death of his teſtator, had rent due, and the goods of the tenant were taken in execution, and the executor gave notice before the removal of the goods, and it was determined by the court, that an executor ſhould have the benefit of this act, as well as the landlord himſelf, for it is an intereſt veſted. *Forteſc. Rep.* 359, 360. *Stra.* 214.

Goods were taken in execution, and the money levied, then adminiſtration was taken to the landlord, who died inteſtate, and the adminiſtrator moved the court to have a year's rent; but it was determined, that as execution was executed, he was too late. *Forteſc. Rep.* 360. *Stra.* 97, 214. *Gilb. Eq. Rep.* 223, 224.

*Powis* J. *e contra*, held that execution was not to be ſtayed unleſs there was notice; but held that in this caſe the adminiſtrator was entitled to it, becauſe 8 *Ann. chap.* 17. ſays, that no goods, *&c.* ſhall be liable to any execution, unleſs before the removal of them the party ſuing ſhall pay, *&c.* which words he held, bound the goods with the rent in arrear in reſpect of the party ſuing; ſo that though

the ſheriff not having notice removed them, they continued bound in his hands, and upon application the arrears ought to be paid by him, and that if they were ſold, and the money delivered to the party ſuing, he became chargeable with the arrears. (*Quære*, What remedy the landlord could have againſt the party ſuing after execution perfectly executed?) He alſo held that the adminiſtration ſhould have relation to the death of the inteſtate, becauſe, by the *eccleſiaſtical* law, it is not to be granted within 14 days of an inteſtate's death; which the other juſtices denied, and ſaid that relations being fictitious ought not to hold place againſt the rights of ſtrangers.

It was agreed *per tot cur'*—That though the landlord be the only perſon mentioned, to whom the arrear is to be paid by the party ſuing, executors and adminiſtrators, being the perſons upon whom the right to the arrears devolves, are within the ſtatute; and ſays, that *Powis*'s opinion ſeems to be better grounded than that of the other juſtices; for the ſtatute was made for the benefit of the landlord only, and with deſign to prefer his year's rent in arrear to the execution, and the words of the ſtatute, *viz.* unleſs the party ſuing out execution ſhall before the removal of the goods pay to the landlord, *&c.* then the party ſuing execution, paying to the landlord, *&c.* may proceed, *&c.* ſeem plainly to make it incumbent upon the party ſuing to take notice whether there be a landlord, and what rent is in arrear; and if, by the removal of the goods without notice, the landlord ſhall be excluded from demanding the rent in arrear, the ſtatute will be almoſt ineffectual, ſince the landlord cannot but be preſumed to be a ſtranger to the proceeding againſt his tenant. 11 *Vin. Abr.* 133. in notes.

Caſe by the plaintiff as adminiſtrator of *J. S.* againſt the defendant as bailiff of the liberty of the dutchy of *Lancaſter*, for executing a *fieri fácias*, and removing the goods off the premiſes before the landlord was paid a year's rent, purſuant to the above ſtatute; the general iſſue pleaded, verdict and judgment for the plaintiff; a writ of error brought, and upon the general errors being aſſigned, the judgment of the *Common Pleas* was affirmed. *Stra.* 212. 11 *Vin. Abr.* 134. *pl.* 30.

On an execution againſt the defendant, the court was moved on behalf of *Sadler* the defendant's landlord, for a rule on the ſheriff, to levy and pay him a year's rent; and the queſtion came upon this, whether the ſheriff was to have his poundage, and from whom? After ſeveral motions, the court made a rule for him to pay the landlord without any deduction. *Stra.* 643.

On motion for a rule on the ſheriff to pay the ground landlord of an houſe, in which an under leſſee dwelt, and againſt whom an execution

ecution was ſued out, a year's rent purſuant to the above act; but it was held, that this was not a caſe within the ſtatute, which extends only to the immediate landlord. 2 *Stra.* 787.

After the landlord had a year's rent paid out of the execution money according to the above ſtatute, there came in another execution, and the ſheriff refuſing to levy him another year's rent, he moved the court for a rule, but was denied; for the intent of the act was only to continue a lien as to one year, and to puniſh him for his *laches*, if he let more run in arrear. If he had any thing to ſupport his demand, he might bring an action againſt the ſheriff. 2 *Stra.* 1024. *Andr.* 219.

Where land is let for a year, and afterwards at will for leſs rent than before, and both rents are payable half-yearly, and at the end of the firſt half-year under the laſt demiſe, an execution comes, the landlord is entitled only to the two laſt half-year's rent. *Andr.* 218.

Where land is let for a year, and then part thereof at will, and an execution comes, the landlord is not entitled to any part of the firſt year's rent. *Andr.* 218, 219.

There is a proviſo in the above act of 8 *Ann.* that nothing in the act contained ſhall extend, or be conſtrued to extend, to let, hinder or prejudice her Majeſty, her heirs or ſucceſſors; but that it ſhall and may be lawful for her Majeſty, her heirs and ſucceſſors, to levy, recover and ſeize ſuch debts, fines, penalties and forfeitures, in the ſame manner as if the act had never been made; any thing, *&c.* *Stat.* 8 *Ann. c.* 14. *ſect.* 8.

One *Southerby* was outlawed, and an *extent* iſſued, and an inquiſition was taken thereupon, and his houſe and goods ſeized by virtue thereof. *Etchins* the landlord moved upon the ſtatute of 8 *Ann.* to have the goods delivered to him, ſuggeſting that they had been diſtrained by him for rent three days before the *extent*. It was held, that not the party, but the King, was only concerned in the outlawry, and the landlord was not relieved upon the motion. *Bunb.* 5. *pl.* 5. The ſame motion was made in *Mich. term* 1717. Defendant was not relieved. *Ibid.* A note of the reporter.

An *extent* bearing date the 4th of *November*, iſſued againſt *Dale*, by virtue of which, corn and hay were ſeized; but *Mitchell* the landlord having diſtrained the ſame for rent the 29th of *October* before, refuſed to let it go; upon which an attachment was moved for againſt *Mitchell*, the goods not having been ſold within five days, purſuant to the ſtatute of 2 *W. & M. ſeſſ.* 1. *c.* 5. no property was diveſted by the diſtreſs, and they were in the landlord's hands only

by way of pledge; but an attachment was refuſed for the reaſons in the report. *Bunb.* 42. See *Dy.* 67. *Rol. Abr.* 673. *pl.* 8. *Noy* 119. *Vent.* 37. *Cro. Car.* 148. 2 *Saund.* 47.

On the 12th of *February* 1728. an *extent* iſſued againſt *P.* tenant of *S.* the 22d of *April*, 1729. *S.* diſtrains for rent; the 30th of *April*, 1729, the inquiſition finds the goods then in the poſſeſſion of *P.*

*Note.* The *extent* was not executed till the 23d of *April*, the day after the diſtreſs. On motion that *S.* might have the benefit of the ſtatute 8 *Ann.* for his rent, notwithſtanding the *extent*; but denied. *Bunb.* 269. *pl.* 345.

## *Of a Reſcue.*

WHEN a perſon is reſcued, be it on *execution* or *mean proceſs*, no action for this lies againſt the ſheriff; and if the priſoner be arreſted on meſne proceſs, and as he is bringing to the gaol he is reſcued, no action lies againſt the ſheriff, for the ſheriff cannot be ſuppoſed to have the *poſſe comitatus* upon every meſne proceſs; otherwiſe if it be on execution, there *caveat vicecomes*. But if he be arreſted on meſne proceſs and brought to the gaol, then it is no good return for him to ſay, the gaol was broken, and ſo he was taken from him. And therefore action on the caſe was brought againſt the ſheriff of *London* and *Middleſex* on eſcape; they plead they have have taken the party on a *latitat*, and that, in bringing him from *Iſlington* to the gaol, reſcous was made of him from them, and ſo return the reſcous. 2 *Bulſt.* 198. *Cro. Jac.* 419. *Mo.* 852. *Cro. El.* 868. *Noy* 40. *Rol. Rep.* 388. *Rol. Abr.* 98. *Poph.* 192.

*Per cur'*—The plea and the return is good, notwithſtanding *Waldoe* and *Lambert*'s caſe, 44 *Eliz. B. R.* and that upon the former differences; and the difference between meſne proceſs and execution was enforced in this caſe. If the ſheriff takes one in execution for debt, and after he ſuffers him to eſcape, the debt is gone, and the proceſs ſerved; therefore in ſuch caſe, if he ſhould not have his remedy by way of action againſt the ſheriff, he ſhould be without remedy; but not ſo in meſne proceſs, for there the party may be taken again. See 6 *Mod.* 141.

An action of debt lies againſt the ſheriff on a *cap'* returned *qd' cepit corpus*, and he was reſcued. 2 *Rol. Rep.* 57, 58.

No *reſcous* can be on a *fieri fac'* for goods, but in ſuch caſe the party ſhall have action on the caſe; and *reſcous* lies only on a *capias* which

which lies againſt the perſon, and *Cro. Car.* 515. *Sly* and *Finch*'s caſe, which is full as to the point, and was as follows. *Lit. Rep.* 297. *Hetley* 145.

A *ſcire fac'* was brought againſt *Finch*, ſheriff of *Glouc'*, for that the plaintiff having brought a *fieri fac'* directed to *Finch*, he returned that he had taken goods into his hands to the value of 72*l.* and had ſold as much of them as amounted to 11*l.* and the reſidue remained *pro defectu emptorum* till ſuch a day, at which time he putting them to ſale, they were reſcued from him; upon which return the *ſcire fac'* was brought to ſhew cauſe, why the remaining debt ſhould not be levied on his goods. To this the defendant demurs. All agreed that the return is not good. But the queſtion was, whether he has charged himſelf by this writ. *Cro. Car.* 515. *Saund.* 340, 343. 2 *Keb. Rep.* 789. *pl.* 27. 821. *pl.* 32.

*Per cur'*—He is chargeable by this return. If he had returned only *qd' remanent pro defectu emptorum*, therein had he done his office, and in ſuch caſe on the election of a new ſheriff, a *diſtringas vicecom'* ſhall iſſue to ſell the goods, and to deliver the money to the new ſheriff. But when he ſays further, that they were reſcued out of his hands, therein he hath miſdemeaned himſelf: and by *Dodderidge*, the ſheriff hath charged himſelf by this return, as well in regard of his miſdemeanor, as alſo that he hath his remedy over againſt the reſcouſſers; nor can the court award a writ of *vendit' exponas*, becauſe it is againſt his return. But if it be objected, that perhaps he had ſeiſed the goods again, ſo as he may ſell them on a *vendit' exponas*, if ſo, then he ought to have pleaded it to the *ſcire fac'*, and it had been good.

It was a great queſtion, if one ſhould have action againſt the parties that reſcued? Three judges were of opinion he ſhould, though it was well objected, if he ſhall have action againſt the party, he ſhall alſo have action againſt the ſheriff, and ſo be twice ſatisfied; and the ſheriff ſhall have action againſt the party, and ſo he ſhall be twice charged.

*Note.* It has been held, that a man in ſome caſes ſhall have election of action, and both are but to recover damages; a man had an execution againſt one, another ſaw the man and conveyed him out of ſight: action on the caſe lies againſt him, and perhaps the ſheriff is dead, and he ſhall have no remedy.

The law gives a man remedy againſt the party that doth the wrong. If an action on the caſe will lie for hindering a ſheriff in executing of his office, a *fortiori* when it is actually done, and he is reſcued out of cuſtody.

That

That the action will lie. There is a miſchief on both ſides; the defendant may be twice charged, and the plaintiff may loſe his debt; and if the ſheriff brings the action, he may plead the recovery by the plaintiff. When the ſheriff has made his return of the *reſcous*, there is no remedy againſt him; and if the party taken be reſcued before he be brought to the gaol, there is no remedy againſt the executors of the ſheriff. If debt be brought againſt the ſheriff, and in that a recovery, the plaintiff ſhall never take the defendant again; and ſo if he bring action againſt the party and recovers, the ſheriff may plead that; and *F. N. B.* 12. is doubtful.

That the action does not lie. The difference is good where a man is arreſted upon meſne proceſs and reſcued, and after becomes nonſolvent, ſo that they who reſcued him are the cauſe of the loſs of my debt, it is a wrong upon which he may be indicted, yet the party ſhall not have remedy againſt him, becauſe he may proceed. *Yelverton* of the ſame opinion, and agreed the difference.

On meſne proceſs the ſheriff never had remedy for the *reſcous*, but he ſhall return the *reſcous*; but upon execution he ſhall not return the *reſcous*, but have an action, and the party is not prejudiced, for he ſhall have an action againſt the ſheriff, though in judgment of law the party is liable.

The reſcouſer ſhall be doubly puniſhed, by the King and by the party; upon the return of the ſheriff, he ſhall be fined to the King, and attachment ſhall iſſue out againſt him, and the party ſhall have a writ of *reſcous* againſt him, and ſo ſhall the ſheriff too.

An action on the caſe lies againſt the party that reſcouſed, by the party who had the loſs, and he ſhall not be forced to ſue the ſheriff, for perhaps the ſheriff is dead, and then no action lies againſt the executors *(actio perſonalis moritur, &c.)* and if the plaintiff recovers, the parties may plead, if they be ſued by the ſheriff, ſo as there is not any danger of being doubly charged; ſo in *Hopping's* caſe, 2 *Keb.* 340. action on the caſe caſe lies againſt the reſcuer as well as the ſheriff. But as to the caſe of *Myn* and *Cunningham*, which was full to the point, and the reaſons in reſpect to this, and other caſes of like nature, are weighty. I have ſet down as it is in the book, with the reaſons of the judges that differed in opinion. *Cro. Car.* 109. 2 *Keb. Rep.* 340. *pl.* 8.

The defendant *B. S.* eſcaped out of the bailiff's hands when *B. S.* was arreſted by *alias capias* out of the *King's Bench*, which writ is only in the nature of a plea in treſpaſs; the party who reſcued him ſhall anſwer in this action damages for the debt, which was 300 *l.* becauſe by this means the defendant loſt his debt; but if the ſheriff or bailiff

in this case had only suffered a negligent escape, they should be charged only with the damages in the same plea as the writ supposes, and nothing for the debt. *Lane's Rep.* 70.

Error was brought to reverse an indictment of *rescous* and *riot*, and the errors assigned were:

1. There was a warrant to three *conjunctim & divisim* to arrest *H.* and two of them arrest him, it ought to have been by one, or all three, because it is a ministerial act.

2. *Juratores pro domino rege præsentant*, and do not say 12 jurors present, and peradventure but eleven did present. *Poph.* 202.

The names of the jurors ought to have been certified, for peradventure they were not *probi & legales homines*, but villains and outlaws. 15 *H.* 4. 41.

3. An indictment before coroners, which found *B. felo de se*, was quashed, because it did not appear it was *per sacramentum proborum & legalium hominum.*

4. It is found that the sheriff, by virtue of a writ directed to him, came, &c. and upon this *rescous* was made by *H.* &c. and it appears not what manner of writ it was, (*viz. Eleg. capias*, &c.) and if there were no writ, there can be no *rescous*; and albeit he had no writ, yet if execution were done by virtue of another writ, the party may disobey it, (if he be not a bailiff known) as if on *hab' fac' seisinam* the sheriff makes a warrant as on a *capias*. Poph. 202.

An indictment for a *rescous* returned against one in *B. R.* ought not to be quashed, although it be erroneous, except the person indicted for it do personally appear in court. 2 *Lil. Abr.* 573.

An indictment of *rescous* ought to express the place where and the time when the *rescous*, or else it is ill for the uncertainty. 2 *Lil. Abr.* 573.

A return of a rescue, and four exceptions taken to it.

1. That it is said the bailiff by virtue of the warrant took the defendants and arrested them, when by law it is the arrest of the sheriff; but it was over-ruled *per cur.*

2. It is not said that the defendants, who were man and wife, were in the possession of the bailiff; but said only that the bailiff took and arrested them, and being so arrested, and being in my custody, they

they were reſcued out of my cuſtody; this was held well *per cur'*, for that *exiſtentes in cuſtodia* was an affirmative.

3. Objected, that in the return it is ſaid, that *Parker* and *Mary* his wife *non ſunt inventi in balliva mea*, but do not ſay *quod uterque eoru' non eſt invent'*; for though it was urged that this part of the return did not concern the party injured, who was the plaintiff; yet *per cur.*—We muſt judge upon the whole return, and this is an excuſe returned why he did not execute this writ; and the excuſe is not compleat, for he might not be able to find the wife, and yet might find the huſband, and the difference is between an affirmative and a negative in the nature of the thing; if you affirm, you muſt affirm of each, but it is the contrary of negatives.

4. That it is not ſaid *Vi & armis* they reſcued, but only *Vi & armis* to the aſſault; and for this I held the return nought, *ſilentibus* the reſt of the court. To ſupport the firſt reſolution, the caſe of *the King and Maſchal Cooke* was quoted, which confirmed my opinion alſo as to the *Vi & armis*. Forteſ. Rep. 362.

A warrant was from the ſheriff to the bailiffs of the liberty of *Pomfret*, who did execute it, and there was a reſcous; and the bailiff may have the action againſt the reſcuers in his own name; but he failed in proving it to be a liberty, and was nonſuited, *&c.* And *note*, he was was put to it firſt to prove the liberty by records. *Clayton* 149.

*B.* brought a *latitat tempore Eliz. ver. E.* who was ſerved in the time of King *James*, and *E.* reſcued himſelf, and the reſcue was returned by the ſheriff of *Eſſex*. Per cur.—This is good; for a *latitat* is within the ſtatute of 1 *Ed.* 6. and is not loſt or abated by the demiſe of the Queen; for it is not any original writ, but is in the nature of an execution, grounded on a record precedent, *viz.* upon a bill of *Middleſex*, ſo that the *latitat* iſſues upon a ſuit depending; and the arreſt was good, and ſo the reſcous. *Yelv.* 52.

In the declaration, the time of the arreſt muſt be ſhewed upon which the *reſcous* is ſuppoſed to be made: and it muſt be ſhewed, that the party *reſcued* was in cuſtody of the ſerjeant or ſheriff from whom he was reſcued. *Styl. Rep.* 432.

The plaintiff declares, whereas one *S.* was indebted to him by bond in 300*l.* and for non-payment he ſued a *latitat* out of the *King's Bench* directed to the ſheriff of, *&c.* to arreſt him, returnable at ſuch a day, intending upon his appearance, and bail put in according to the courſe of the court, to declare againſt him, (and ſhews the courſe and cuſtom of the court, that he upon appearance ſhould put in good bail;

bail, that if judgment were had againſt him he ſhould ſatisfy the condemnation, or render his body in execution,) that he delivered the writ to the ſheriff of *Nott'*, who made a warrant to the bailiff of the King's liberty of *Newark* to execute it; which warrant was delivered to *L.* deputy of the Lord *Burleigh*, *ballivi libertat' domini regis Wapentagii ſui de Newark*; who by force thereof arreſted the ſaid *S.* that the defendant reſcued him out of the cuſtody of the ſaid deputy, and he eſcaped, *&c.* Errors moved in the *Exchequer-chamber*.

Firſt, becauſe the cuſtom of the *King's Bench* is alledged to be, that if any one arreſted comes *ſub cuſtodia vicecomit'*, he ſhall put in bail, which is not ſo, for he ſhall be *in cuſtod' marr'*, and no declaration can be againſt him *ſub cuſtodia vicecomitis*. But not allowed.

Secondly, it is ſaid he was reſcued from the deputy of the bailiff; where it ought to have been from the bailiff himſelf, or from the ſheriff. *Sed non allocatur'*, for there is a diverſity in this caſe, which is an action on the caſe, wherein he ſhall ſhew the truth, as *in rei veritat'* it is, and not as it is upon the returns of reſcues and indictments, which ſay it is done to the ſheriff or bailiff himſelf. *Cro. Jac.* 241. like *Lane's Rep.* 70. In that caſe it was declared, that the bailiff of a liberty arreſted the party, and delivered him to the ſheriff's deputy, and that he reſcued him from the ſheriff's deputy. *Dy.* 244. and judgment *pro querente* in that caſe, and in *Lane's Rep.* 70. in the ſame caſe ſays, that the courſe the *King's Bench* is always ſo in return of a *reſcous*, to be out of the hands of the deputy bailiff; notwithſtanding *Dy.* 241. and the declaration was held good, that he ſued an *alias capias*, without mentioning a *latitat*, before this arreſt was made by the deputy bailiff of *Newark*. But the main queſtion was, becauſe it doth not appear, that the bailiff had a power in his patent to make a deputy bailiff.

The action is brought in *Suffolk* againſt the ſheriff of *Suffolk*, for arreſting the defendant in the firſt action upon a *capias utlegat'*, and ſuffering him to eſcape, and the defendant in the firſt action is named of *S.* in *Com' Norfolk*, and the arreſt is ſuppoſed *apud S. præd'*, ſo the arreſt is ſuppoſed in the county of *Norfolk*, and then it is *tortious*, and there is not any eſcape thereon. *Per curiam*—It is an incurable error. *Cro. Eliz.* 877.

In an action on caſe on a *reſcous*, the plaintiff declares, that *A.* was indebted to him by obligation of 20 *l.* and that he ſued a writ againſt him directed to the ſheriff of *Cornwall*, to take *A. &c.* and that the ſheriff 1 *Oct.* 6 *Car.* arreſted him at *L.* in *Com' Cornub.* and after the defendant at *Weſtminſter*, the *præd'* 1 *die Octob.* reſcued him out of the cuſtody of the ſheriff; and on *non culp'* verdict and judgment

*verſ. quer.* he brought error and aſſigned this for error, for that it was impoſſible he ſhould be arreſted at *L.* and the ſame day be reſcued at *Weſtm.* (200 miles diſtant) yet the court will not intend it to be impoſſible. But however, ſee what reaſons the plaintiff ſhall have to aſſign error on his own declaration. *Rol. Abr.* 523.

In treſpaſs laid and tried in *Somerſetſhire*, the defendant juſtified by warrant to the ſheriff of *Dorſet*, and that the plaintiff endeavoured to reſcue himſelf, and iſſue *de injuria ſua propria*. *Gould* after judgment, becauſe within the words of 17 *Car.* 2. *c.* 8. there being three judgments in the point. 2 *Keb. Rep.* 496. *pl.* 51. *Leon.* 103. *pl.* 127. But the court were not ſatisfied with theſe judgments, and reſolved that the ſtatute intended the trial where the cauſe of action ariſeth. But there was a *replead'*, becauſe the defendant traverſed, *abſque hoc*, that he was guilty *aliter vel alio modo*. The reply was, he was guilty *aliter & alio modo*, which was a wild iſſue. 3 *Keb. Rep.* 552. *pl.* 62. 612. *pl.* 68.

In action on the caſe on an eſcape, upon meſne proceſs, defendant pleads a *reſcous*. Ever ſince 6 *Car.* 1. it hath been held a good plea. *Per cur'*—If it be returned, it is a good plea, and it need not be averred in the plea that it was returned. But in debt on eſcape it is no plea. 3 *Keb Rep.* 513. *pl.* 68.

In an action on the caſe for a *reſcous*, one may traverſe, *&c.* but *quære*, if not guilty may be pleaded to the ſheriff's return of a *reſcous*. Keb. Rep 258. *pl.* 35.

A *ſcire fac'* to have execution of a judgment in debt. Defendant pleads, that at another time the plaintiff had ſued execution by *capias ad ſatisfaciend'*, and that he was taken thereupon; plaintiff replies, true it is, he ſued a *ca. ſa.* and the defendant was taken thereupon, but he preſently reſcued himſelf and eſcaped. Replication is good, as there is no cauſe for the defendant to have *audita querela* when he is eſcaped and taken again, unleſs it be for a voluntary permiſſion by the ſheriff; ſo there is not any bar for the plaintiff to have new execution. And though it is no good return on a *ca' ſa'* that the defendant reſcued himſelf (for the ſheriff at his own peril ought to have kept him) nor any plea in debt on eſcape, yet the party himſelf ſhall never take advantage of his own tortious act. And *ſcire fac'* after the year is well maintainable. *Cro. Car.* 240, 255.

An action on the caſe on *reſcous* is out of the common rules of the court to alter the *venue*; but it is in the diſcretion of the court, on circumſtances, to alter it: as an action brought againſt a bankrupt may be brought in the county, or here where the commiſſion is awarded. *Keb. Rep.* 346. *pl.* 26.

There

There is a difference between a warrant of record and a warrant or authority in law, for if a *capias* be awarded to a sheriff to arrest a man for felony, albeit the party be innocent, yet cannot he make *rescous*. But if the sheriff will, by authority which the law gives him, arrest any man for felony who is not guilty, he may rescue himself. *Coke Lit.* 161. *a.*

Four nobles fine is a general fine imposed for a rescue. 2 *Jo.* 198.

In debt *sur escape ver vit'*, plaintiff declares that *J. S.* and his wife were in execution, and that she escaped. On *nil debet*, special verdict found, that the baron was in execution, and that he escaped; and further, that the wife was not taken in execution, (being for debt contracted before coverture) yet judgment *pro quer.* the verdict was not in the whole pursuant to the declaration, because they found the husband escaped. *Sid.* 5.

In an action on the case upon a *rescous* and escape, the jury found the debt due to the plaintiff, the prosecuting the *latitat* for this cause, the making the warrant hereupon to the sheriff, &c. *Cro. Jac.* 485.

In the case of a *rescuer*, there are two ways of proceeding for his discharge:

1. If the rescue is returned to the filazer, and process of outlawry issues, and the rescuer is brought into court, he shall not be discharged on affidavits.

Where upon the return of a rescue an attachment is granted, and the party examined on interrogatories, there, upon answering them he shall be discharged. 2 *Salk.* 586.

On an affidavit of a rescue on mesne process, an attachment was prayed against the rescuers, but denied; for by *Holt*, the rescue must be returned on the writ, and the motion and attachment founded upon that: but it is never granted on affidavits. 2 *Salk.* 586.

## *Of Escapes.*

AN *escape* is where one that is arrested, or imprisoned on the arrest, comes to his liberty before he is delivered by order of law,

1. Between a negligent and a voluntary or permissive escape. A permissive or voluntary escape, is by the assent, privity, and knowledge of the sheriff, gaoler, &c. whether the prisoner may be retaken or not.

2. Between an eſcape on meſne proceſs, and on execution, in eſcape upon the arreſt by the ſame proceſs; as a *cap' ad reſpond'*, the writ ought to ſurmiſe *ad largum ire permiſit, & non comparuit ad diem*, becauſe the party was bailable, and the ſheriff might ſuffer him to go at large. *Aliter*, if the arreſt be upon execution, as a *cap' ad ſatisfac'*, there *permiſit ire ad largum* is good enough. *Noy* 72.

3. Between an eſcape for debt, and for felony or treaſon.

4. Between an eſcape by a ſheriff or bailiff, and an eſcape cauſed by reſcous. A reſcouſer ſhall be charged with the debt. The ſheriff or bailiff for a negligent eſcape ſhall be charged with the damages only in the ſame plea as the writ ſuppoſeth, and not with the debt. *Lane's Rep.* 70

5. Between an eſcape in fact, and an eſcape in law; as where a man may be in cuſtody without actual arreſt.

6. Between error in the proceedings and nullity of the record, and how the ſheriff ſhall take advantage of either.

7. Between an eſcape in the life of the teſtator, and an eſcape in the time of the executor, upon execution in the time of the teſtator.

If judgment be reverſed before action of *debt* brought for an eſcape out of execution, the action is gone. *Saund.* 38, 39. *Lev.* 191. *Sid.* 305. *pl.* 14.

The occaſion of ſo much liberty in the *Marſhalſea* is, that the marſhal is not chargeable but by bill, which muſt bear *teſte* in term time; and ſo in the former term the party is not eſcaped. And by the firſt day of the latter term, the priſoner generally is to return to priſon, and ſo no remedy for the party. *Keb.* 794.

If a ſheriff hath in his cuſtody divers perſons in execution, and dieth in the time of his office, and after a new ſheriff is made; here the new ſheriff at his peril ought to take notice of all the executions which are againſt any perſon which he finds in the gaol; but this is by reaſon of the neceſſity, for that there is no perſon to make delivery of to him, or to give him notice; and beſides, the new ſheriff may take notice himſelf of all executions, they being upon record.

Alſo in the former caſe, the ſheriff (it ſeemeth) is to take notice of all other priſoners in the gaol, and of the cauſes of their commitment; and ſo the new ſheriff (upon the death of the old ſheriff, during the time of his office) is chargeable without either delivery of the priſoners, or notice of the cauſes of their commitment.

And

And ſo it ſeems for the delivery of the writs, upon the death of the old ſheriff during the time of his office, the new ſheriff is to take notice of all other writs, (and of the contents thereof) which ſhall be in the hands of his predeceſſor, or his under-ſheriff.

If a ſheriff die in the time of his office, and that before another is made ſheriff, there if a priſoner who is in execution ſhall break the gaol and eſcape, and go his way, yet this is no eſcape; for that by the death of the ſheriff, all his priſoners were in the cuſtody of the law, until a new ſheriff be made; and the priſoner may be taken again in execution at any time after whereſoever he ſhall be found.

If ſuch priſoners ſhall be in the gaol at the time ſuch new ſheriff is made, there the new ſheriff (as ſoon as he is appointed by the King, or at leaſt as ſoon as he has received his patent) ſeemeth to be chargeable perfectly with them, without any delivery or notice made or given to him of the ſaid priſoners, or of the cauſes of their commitment; and if priſoners ſhall after get out of the gaol, this is an eſcape; yet if it be without the conſent of the new ſheriff, or his gaoler, then they alſo may be taken again at any time after.

If the ſheriff, or any of his officers, do ſuffer any priſoner being in execution, to get at liberty before the debt be ſatisfied, the creditor may either have his action of debt againſt the ſheriff, and ſo ſhall recover his debt, or elſe the creditor may have an action of the caſe againſt the ſheriff.

If the priſoner do eſcape of his own wrong againſt the will of his officer, although he eſcape and get out of ſight, or into any other county where the ſheriff or officer hath no authority, yet if freſh ſuit be made, and he be taken again upon the freſh ſuit, he ſhall be ſaid to be ſtill in execution. 3 *Co.* 52.

On ſuch an eſcape againſt will, if he be taken again upon the freſh ſuit, before any action brought for the eſcape, it ſhall be adjudged no eſcape. 2 *Stra.* 173. *Barnard. K. B.* 354. *Com. Rep.* 554. *pl.* 231.

And if the action be brought for ſuch an eſcape, yet the ſheriff may take the eſcaper again, and detain him in cuſtody till he hath made his agreement with the ſheriff, or elſe he may have an action of the caſe againſt him; and in theſe caſes he ſhall not be relieved, becauſe the eſcape was of his own wrong, and without the conſent of the ſheriff or his officer.

When a man is in cuſtody of the ſheriff by proceſs of law, and another writ is delivered to him to take him, preſently in the judg-

ment

ment of law, he is in cuſtody without actual arreſt, *quia lex non præcipit inutilia*; as *A.* recovered in debt, defendant was outlawed, and after the year the plaintiff procures a *capias utlegat*, and delivers it to the ſheriff of *London*: after the ſerjeant arreſts the defendant to anſwer *J. S.* before the ſheriff, the plaintiff delivers the ſheriff's warrant to the defendant, (who had the defendant in the houſe) to arreſt the defendant; the ſerjeant refuſeth, and after the ſheriff ſuffers him to go at large. Plaintiff brought action againſt the ſheriff, ſuppoſing he had arreſted him, and defendant pleaded *non permiſit*, &c. 5 *Rep.* 89.

By *Winham* in *Benſken*'s caſe: by law the bailiff ought not to hurry away immediately to priſon, but he may call any other perſon in aid, and ſo may commit the priſoner to them. *Keb. Rep.* 483. *pl.* 2.

If by aſſent the ſheriff ſuffer one to go at large, no action lies for the eſcape. *Aliter*, if without conſent, and he may be taken again on freſh ſuit. 3 *Co.* 52.

If a man in execution be ſuffered to go at large for a time out of the county, and to return again, and this upon bail or mainprize, yet this is an eſcape, for he ought to be kept *arctâ cuſtodia*. So if he be ſuffered to go at large to any place within the county, and to return again; ſo if he be ſuffered to go at large within the ſame town where the priſoner is, it is an eſcape, though he return within his time. *Plowd.* 36. *b.* 3 *Co.* 44. *Hob.* 273. (202.)

The caſe was, *A.* recovered upon a plaint in *London* againſt *B.* and had him in execution in *Ludgate*. *A.* died inteſtate. *B.* was permitted by the keeper of *Ludgate* to go at large in *Southwark* with *J. S.* ſervant of the keeper, and by the command of the keeper. The adminiſtrator of *A.* brought debt againſt the ſheriff of *London* upon the eſcape. *Per cur.*—It was an eſcape. He that waited upon him into *Surry* could not be officer to the ſheriff of *London*, and ſo he had no keeper; for the power of a ſheriff does not extend beyond his own county, unleſs in ſpecial caſes. And the party might have action of *falſe impriſonment* againſt him, though the *baſton* or ſervant waited on him there, being voluntary. *Dyer* 166. *accord.*

If the ſheriff removes his priſoner out of the county without being commanded, it is an eſcape; and if he removes the priſoner for eaſe and delight in the ſame county, it is an eſcape: as a priſoner went to a bear-baiting with his gaoler in the ſame county; and it was adjudged an eſcape. So if the ſheriff permit his priſoner to go to work, it is an eſcape. *Hetley* 34.

To ſuffer a priſoner to walk in the town, though with a keeper is an eſcape, unleſs it be upon an *habeas corpus* from a court of juſtice. *Hob.* 202.

If the *habeas corpus* bears *teſte* in the end of one term returnable in another, and this writ will not warrant the priſoner to go at large in the vacation. *Hob. ibid.* For though the ſheriff may remove his gaol from one place to another within his bailiwick, yet he muſt keep it and his priſoners within it, and not ſuffer them to go at large out of the priſon, though he himſelf be attending on them, without an *habeas corpus* from ſome court of juſtice. And let keepers of priſons beware, when they receive an *habeas corpus* from the *Chancery*, or any other court bearing *teſte* in the end of a term, to have the body of one in execution in the court the next term, that they do not, by colour of ſuch writs, ſuffer the party to go at large all the mean time, (as it is ſometimes practiſed) for the writ warrants no more than that he be brought out of priſon only for that purpoſe, and only for ſo much time as in judgment of law ſhall be convenient and neceſſary for the execution of the writ, and no more, which *privilegiis odioſis* muſt ever be ſtrict.

An *hab' corp'* out of that court to which the party is a priſoner, doth juſtify the gaoler in aſſize time, but otherwiſe if it be out of any other court; but out of which ſoever, if the authority of the writ be executed, either in time or place, at the pleaſure of the gaoler or priſoner, it is an eſcape, as being carried a month before the time, and ſtaying a month after; alſo the *habeas corpus*, being at a place and day certain, it is no pretence of ſtay at any other places or *ultra*, to ſearch writings, or to ſpeak with witneſſes, and *immediate* is a convenient time without wilful delay. So though the ſheriff be not bound to bring the priſoner the direct way, yet he ought not to carry him round about a great way, for the accommodating of the party: if he do, it is an eſcape. 3 *Keb. Rep.* 306. *pl.* 47. *Mod. Rep.* 116.

But upon this point of the priſoner's being ſuffered to go at large, there is a diverſity to be well heeded, and that is,

Between one in execution within the franchiſe or county where the common gaol is, where the office of ſheriff or bailiff extends; for there if the ſheriff, *&c.* aſſent that one in execution ſhall go out for a time, although he return by the time, or if he ſuffer him to get at large by bail or *baſton*, it is an eſcape. But when the ſheriff, *&c.* is commanded by the writ to have the body at *Weſtminſter*, he may be a keeper of him in another county; as *Mo.* 257. *pl.* 404. 3 *Co.* 44. See *Dyer* 257. Upon the ſheriff's ſuffering one to go at large for a time, by the conſent and agreement of the plaintiff, and the priſoner returneth again,

The

The plaintiff was taken in execution by the sheriff of *B.* and by an *habeas corpus* he was brought to *Smithfield* by the gaoler of *B.* and there at eight o'clock at night the prisoner went into *Southwark*, and none with him, and there continued all night, and the next morning he returned to *Smithfield* to his keeper, and there continued with him till the return of the writ, at which day he brought him to the Lord Chief Justice's chambers at *Serjeants Inn*, and he returned his writ, and the Chief Justice committed him to the *Marshalsea*, and it was adjudged to be no escape in the sheriff. So *Mo.* 299. 3 *Rep.* 43. *a.* *Mo.* 357.

For the effect of the writ is performed to have him there at the day, and the writ does not command him to bring him the usual way, but to have his body at the day; and so if one be sheriff of two counties, and had arrested two by two several *capias*'s in two counties, he may bring one into the other county to have them both at *Westminster*, and may bring them the surest way.

If a gaoler, on an *habeas corpus testificandum*, bring one whom he had in execution to be a witness, by *Twisden*, it is an escape, and so has been adjudged.

In *Roll*'s time, the court was moved for an *habeas corpus* for a prisoner in the *King's Bench*, that he might be a witness in a cause in *Derbyshire* at the assizes, but it was denied; but he said he knew it granted for one to be a witness at a trial at *Guildhall*, but at the charges and peril of the party, for whom he was to be a witness if he escape. The court granted an *habeas corpus* for a prisoner in the *Marshalsea* to testify in a cause in *Middlesex*. But *Hale* Chief Justice said, he would never grant it in his chamber, being but a private person, and the party may escape, which would be remediless. *Sid.* 13.

If one be in execution in the *Fleet*, or other place at the suit of the King, or of a common person, and the warden or gaoler (by the command of the Lord Chancellor or Treasurer) suffer him to go into the county with a keeper to gather money, the sooner to pay the King, and he goes accordingly, and returns to prison again; yet this is an escape as to the common person, for the King himself cannot license a man to go at large. *Dy.* 297.

If one be in execution at the suit of the King in the *Fleet*, the warden may suffer him to go to his counsel with his keeper. But not so in the case of a common person. *Sav. Rep.* 29.

A man is in execution for debt, and a woman being warden of the *Fleet*, marries the prisoner; this is an escape, for that he cannot be his own prisoner, nor a prisoner to his wife. *Hetl.* 36. *pl. Rep.* 57. *a.*

So

The ſame if the ſheriff or gaoler marry a woman that is in execution for debt.

A ſheriff ſuffered one in execution, and in his cuſtody, to go and ſee a play; and the ſame was *adjudged* an eſcape, and the party could not be in execution again. *Leon.* 237. *pl.* 321.

*Trin. Car.* 1. A caſe was referred by the King to the judges, whether in regard to the plague a *habeas corpora* may be granted for the priſoners in execution, in the priſons of the *King's Bench* and *Fleet*, on judgment in the *Common Bench* and *Exchequer?* And it was certified by them to the Lord Keeper, that if on *habeas corpus* granted, the gaoler ſuffers the priſoner to go at large with the keeper or baſton, that this is an eſcape, and that no *habeas corpus* ought to be by the law for this purpoſe, which the King well approved of. *Hut.* 129. *Cro. Car.* 466.

In the firſt of *Car.* the priſoners in the *Fleet* petitioned the parliament, that they might have an *habeas corpora* in the *vacation*, in the reſpect of the great plague in *London*; but the parliament would not aſſent to it, becauſe againſt the law. *Cro. Car.* 14.

If a *capias ad ſatisfaciend'* is ſerved on one who is a priſoner for *felony*, and he is indicted and arraigned and found guilty, and afterwards eſcapes. an action of *debt* lies againſt the ſheriff, for the execution was well ſerved on him: and though his body was at the Queen's pleaſure, yet he ſhall not take advantage of his own *tort*, but he ſhall anſwer the ſuit or execution of a common perſon. *Mo.* 274. *pl.* 428. 2 *Leon.* 88. *pl.* 112. *Cro. El.* 164. *pl.* 1. 165, 576. *Sav.* 63. *pl.* 135.

The ſheriff had one in cuſtody on a *ca. ſa.* which iſſued *poſt diem & annum*, without a *ſcire fa'* to warrant it, and he let him eſcape; it was held the ſheriff was liable, notwithſtanding the proceſs was erroneous, and that he could not take advantage of the error. But otherwiſe had it been on a *capias ad reſpond'*, teſted in *Trinity* term, and returnable in *Hilary*, becauſe ſuch proceſs muſt be returnable from term to term. *Salk.* 273. *pl.* 4. 2 *R. Raym.* 775.

In an action of *debt* for 200*l.* on bond conditioned to pay 100*l.* and for want of bail the defendant was committed to the marſhal, and he applied to the juſtices of peace of *Surry*, and procured a diſcharge on the act for relief of inſolvent debtors. The plaintiff obtained an eſcape warrant, on which he was taken; and on a motion to be diſcharged, the court held this to be an eſcape; for he being a priſoner indebted, and alſo charged in above 100*l.* debt and damages, the juſtices had no authority for what they did, and therefore their diſcharge was illegal and void. *Salk.* 273. *pl.* 5.

If the ſheriff delivers the priſoner on a void *audita querela*. This is no eſcape, and there the priſoner may be taken again in execution. *Mo.* 344. *pl.* 479.

If a *ſcire facias* has in it the words of *audita querela*, it is againſt law, and it is an eſcape, if the ſheriff delivers the priſoner on it. *Rol. Rep.* 383.

A forged warrant of attorney for ſatisfaction is delivered into the office, where one is in execution, and the marſhal lets him go. It is an eſcape, unleſs the attorney's hand were to it, or a *ſuperſedeas* delivered. *Keb. Rep.* 873. *pl.* 24.

The marſhal is bound to take notice of all commitments in court. 6 *Mod.* 33.

In other caſes he is not chargeable in eſcape till notice of the commitment. *Salk.* 272, *&c.*

If a man recover againſt *Baron and Feme*, and both are taken in execution, and after the wife is ſuffered to eſcape, though the huſband continue in priſon, yet an action of *debt* lies on this eſcape againſt the ſheriff, in which the whole debt ſhall be recovered; for this was the debt of the wife, and ſhe is as fully in execution as the huſband. An action of *debt* lies on it as well as an action on the *caſe*. The ſame if the *Feme* be only taken in execution. 2 *Bulſtr.* 320r *Rol. Abr.* 810. 3 *Bulſtr.* 150. *Rol. Rep.* 205, 205. *pl.* 6. *Cro. Jac.* 657. *pl.* 8.

A *committitur* entered on the roll is evidence of the perſon's being in priſon, ſo as to charge the marſhal with an eſcape, though ſuch *committitur* be not entered in the marſhal's book. *Adjudged, &c. R. Raym.* 704, 705.

A *capias ad ſatisfaciend'* was delivered to the ſheriff, *ver. J. S.* and after the ſheriff did arreſt *J. S.* by force of *capias utlegat'*, and then the party in the *capias* came to the ſheriff, and prayed that the party might remain in execution for his debt alſo. And the ſheriff ſuffers him to go at large, and on both writs returned *non eſt inventus*. *Per cur'.*—The ſheriff was not bound in point of eſcape to detain the priſoner for the debt of the plaintiff in eſcape; and it is not like where one is in the *Fleet* in execution; there, if other condemnations in other courts be notified to the warden of the *Fleet*, he ſhall be chargeable with them all. *Leon.* 253.

A *ſcire facias* lies not on the eſcape of a bail, if no *ſcire fac'* iſſued out againſt him; for the ſureties ought not to be taken in execution preſently. The condition of recognizance of ſureties is, that they bring

bring in the defendant if he be condemned, or to pay the debt. Now if no *ſcire fac'* iſſues out againſt him, the ſurety being taken cannot plead the releaſe of the plaintiff, or the death of the defendant, in his diſcharge, as he might do on a writ of *ſcire facias*. 2 Leon. 29. pl. 33. Cro. Eliz. 185. pl. 7.

The ſheriffs of *London* by indenture delivered over *J. S.* (in execution at the ſuit of *A.* and *B.* ſeverally) and only mention the execution of *A. J. S.* eſcapes; *B.* brought an action of *debt* againſt the old ſheriffs on this eſcape. *Held by the court*—That this action was well brought; for he cannot be in cuſtody of the new ſheriffs for this execution, becauſe they were not charged with this execution, and the fault was in the old ſheriffs that they omitted this execution of the plaintiff in their indenture; and the eſcape began *eo inſtante* that the old ſheriff delivered the priſoner to the new, for then they ceaſe to have the cuſtody of him, and although he remain in the rules of the priſon, it is an eſcape in law. 3 *Co.* 72.

The old ſheriff arreſted one on a writ of *latitat*, and at the day returned *languidus*, *&c.* and afterwards *in exitu ab officio ſuo* delivered him to the new ſheriff, as a priſoner for this cauſe, and the new ſheriff ſuffered him to go at large. Held that this was an eſcape in the new ſheriff, and an action on the *caſe* lies againſt him; aud though the other ſheriff returned *languidus*, *&c.* yet this is not material to the plaintiff, he remains always in priſon. *Cro. Jac.* 380. *pl.* 8. See *Sid.* 5.

If the ſheriff takes a man in execution, and after a new ſheriff is made; and before the other ſheriff delivers over, the party was in execution he eſcapes; the new ſheriff is not chargeable for this eſcape, but the old ſheriff; for the new ſheriff is not chargeable with any priſoner before delivery to him, which muſt be by indenture legally entered. 2 *Rol. Abr.* 557.

If the old ſheriff keep any priſoner after he is diſcharged from his office, it is deemed an eſcape. 2 *Leon.* 54. *pl.* 76.

If perſon taken on a *cap'* eſcape, and the ſheriff die, and a new ſheriff be made for the remainder of the year; then the ſame perſon is taken by another *cap'* for the ſame cauſe, and he eſcapes; this will not charge the new ſheriff. *Hob.* 202.

If the priſoner walks abroad, and returns in the time of one ſheriff, and eſcapes in the time of another ſheriff; this is no eſcape in the time of the ſecond ſheriff. *Hob.* 232.

*A.* was taken in execution in the time of the old ſheriff, and then eſcaped; afterwards in the time of the new ſheriff the plaintiff again ſued out a *ſcire facias* againſt *A.* on the ſaid judgment: on which execution was awarded by default, and thereupon iſſued a *cap. ad ſat.* againſt *A.* by which he was taken and eſcaped. *Per. cur.* —The new ſheriff ſhall be charged; for though *A.* was in execution, which was determined by the eſcape in the time of the old ſheriff, yet when a new execution was awarded againſt him on his default in the *ſcire fac'*, the ſame ſhall bind the ſheriff, out of whoſe cuſtody he eſcaped. *Leon.* 3. *pl.* 5.

A priſoner committed is in the cuſtody of the ſheriff and gaoler; and if he be committed to the ſheriff, and the gaoler ſuffer him to eſcape, the ſheriff is puniſhable. For the ſheriff ſhall anſwer civilly for the faults of the gaoler, but not criminally. *Salk.* 272. 5 *Mod.* 414. *R. Raym.* 424.

*Note.* A *precedent* aſſent of the ſheriff will excuſe an eſcape, but not a *ſubſequent* one. *Salk.* 271.

If the ſheriff arreſt a man on a *latitat* or other meſne proceſs, and the priſoner is reſcued from him before he be carried to priſon, and the ſheriff returns the reſcous againſt the reſcuers; this ſhall excuſe the ſheriff in action on the *caſe* on an eſcape, becauſe he is not bound, neither is it convenient for him to bring the *poſſe comitat'* with him to ſerve every meſne proceſs. But if the ſheriff bring him to the gaol, and after he is reſcued out of priſon, and he returns the reſcous, yet this ſhall not excuſe the ſheriff, for he ought to keep his gaol at his peril. But if the ſheriff takes a man in execution, as on a *capias ad ſatisfaciend'*, and he is reſcued before he brings him to priſon, though he returns the reſcous, yet this ſhall not excuſe him, for that he is to take the *poſſe comitat.* and the party cannot have a new execution. 3 *Bulſtr.* 198, 199.

An action of *debt* was brought by the plaintiff, executor of *A.* againſt the defendant, as executor of *B.* formerly of the county of *D.* On *nil debet* pleaded, the jury found a ſpecial verdict, *viz.* that *A* recovered a judgment againſt *F.* and ſued a *capias ad ſatisfaciendum* directed to *B.* then ſheriff, *&c.* which writ of *capirs ad ſatisfaciendum* was executed by the under-ſheriff; and *F.* being in cuſtody, aſſigned a term for years to the under-ſheriff in ſatisfaction of the money recovered by the judgment, and to be diſcharged out of execution; and this aſſignment was to be void on payment of the money recovered by the judgment at a day, after the office of *B.* to be ſheriff ſhould determine; and on this *F.* was diſcharged out of execution, and at the day, *&c.* he paid the money to the under-ſheriff; but the under-ſheriff did not pay the ſaid money to *A. B.* and *A.* died, and the

the plaintiff as executor to *A.* brought this action againſt the defendant. It was adjudged, that it did not lie; becauſe the releaſe of *F.* out of cuſtody was an eſcape in the ſheriff, and the receipt of the money afterwards could not purge it. Ld. *Raym.* 399.

*Adjudged*, that if the juſtices at the quarter ſeſſions make an order by virtue of ſtatute *W. & M. c.* 15. for the diſcharge of poor priſoners, which order is not warranted by the ſtatute (as if the priſoner was in execution for more than 100*l.*) and the ſheriff diſcharge the priſoner accordingly, he ſhall not be liable to an eſcape.

*Qu.* Becauſe in that caſe the juſtices had no juriſdiction, and the ſheriff is bound to take notice at his peril for what ſum his priſoner was charged in execution? Ld. *Raym.* 3.

An action for eſcape having been brought againſt the marſhal for diſcharging a poor perſon out of cuſtody, though in obedience to a rule of this court of *King's Bench*; on motion that all proceedings in this action might be ſtaid; it was ſaid the ſtatute had expreſsly provided, that no gaoler ſhould be anſwerable for the eſcape of ſuch perſon ſo diſcharged, which it was hoped was a ſufficient foundation for this motion. Accordingly the court made a rule to ſhew cauſe. *Barnard. K. B.* 439.

Though the proceſs of the court be erroneous, yet the ſheriff ſhall be chargeable on eſcapes; as if firſt *capias* by a wrong name, and the *teſtat.* by a right name; ſo if one who is in execution by a *capias ad ſatisfaciend'*. On a recognizance, though the *capias* is erroneouſly awarded, yet the ſheriff is chargeable. 2 *Leon.* 84. *pl.* 122. 2 *Bulſtr.* 256. *Cro. Eliz.* 188. *pl.* 14. 576.

So that he is not to take advantage of error in the proceedings; otherwiſe it is where he can alledge nullity in the record; and if the court award a *capias* where it lies not to the ſheriff, by force of which he takes the party, and then ſuffers him to eſcape, he ſhall be charged, for he is not to diſpute the authority of the court.

There is a difference where the court has juriſdiction of the cauſe, and where not: where the court has juriſdiction, and does not miſaward proceſs, this is but error; but if the court has no juriſdiction, and does miſaward proceſs, there all is void, and the ſheriff may ſhew this in diſcharge of himſelf.

For example, if a writ of *formedon* be commenced originally in *B. R.* or an appeal in the *Common Bench*, all is void, and no action lies againſt the ſheriff; as *Kingſton* upon *Hull* is a limited juriſdiction, and they hold plea of a bond made out of their juriſdiction, and there-

thereupon a *capias* was awarded againſt the obligor, who, being arreſted on it, eſcapes; no action lies againſt the ſheriff; and this is the difference in the caſe of the *Marſhalſea*. See *Cro. Jac.* 3. *Yelv.* 42. 2 *Bulſtr.* 63. *Brownl.* 83. *Mo.* 274. 8 *Co.* 243.

An action on the *caſe* was brought in *B. R.* againſt the officer of an inferior court on an eſcape; here the plaintiff declares that he brought an action againſt *J. S.* in the ſaid inferior court (as *Kingſton upon Hull*) on an obligation made at *Halifax* in *Com' Ebor'*, and does not alledge this to be within the juriſdiction of the ſaid inferior court, and on this judgment was given and execution granted, and the defendant took him in execution and ſuffered him to eſcape, and on this he brings his action.

This declaration is not ſufficient to charge the defendant, becauſe it is not alledged, the obligation was made within the juriſdiction of the court, for although the action be *tranſitory*, yet this inferior court had a limited juriſdiction of things ariſing within the juriſdiction; and the proceedings there were *coram non judice*, and utterly void, of which the officer ſhall take advantage in this action for the eſcape. *Mar.* 8. *pl.* 20. 10 *Vin. Abr.* 95. *pl.* 5. See *Lutw.* 1567. 2 *Mod.* 197. 3 *Lev.* 23.

In action on the *caſe* on an eſcape againſt the ſheriff of *Lancaſter*, for ſuffering one *M. W.* to eſcape out of execution; and ſhews a recovery againſt him in *B. R.* and *cap' ad ſatisfaciend'*, and a *non eſt inventus* returned; and a *teſtatum* that he concealed himſelf in the county of *Lancaſter*, and a writ was awarded to the chancellor of the county palatine of *Lancaſter*, that he ſhould command the ſheriff to take the ſaid *J. M. ad ſatisfaciend'*, *&c.* *Ita quod* the ſaid chancellor ſhould have him, *&c*, and that the chancellor commanded the ſheriff that he would take the ſaid *M. ita quod* the ſheriff ſhould have him *coram juſticiariis*, *&c.* and the defendant being ſheriff did thereupon arreſt him, *&c.* A writ of error was brought, becauſe the writ directed by the chancellor to the ſheriff was not warranted by the writ directed to him, for it varies from the command; for it ought to have been that the ſheriff ſhould have the body before the chancellor, *ita quod* that he ſhould have him before the juſtices. *But not allowed*; for though there be error in the proceſs, the ſheriff ſhall not take any advantage thereof, but having ſuffered him to eſcape he is reſponſable to the party. *Cro. Jac.* 288. *pl.* 5.

The ſheriff ſhall not take advantage of the error in the proceſs, as in *B. R.* where the plaintiff had judgment to recover more than was due to him. 2 *Saund.* 100.

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An action of *debt* was brought againſt a gaoler for eſcape, who ſaid, the ſheriff did not deliver him lawfully to him. *Per cur.*—He is not to meddle whether the ſheriff delivered him lawfully to him or not.

In an action againſt a gaoler for ſuffering one condemned to go at large; it is no plea to ſay, that the proceſs was diſcontinued before the judgment given for he was a ſtranger to it. 4 *Co.* 84.

If the priſon be broken by the King's enemies, this ſhall excuſe the ſheriff from eſcape, for the gaoler could not reſiſt them, and he can have no remedy over. *Cro. Eliz.* 815. *pl.* 4. *Ventr.* 239.

If a priſon be broken by rebels and traitors within the realm, ſo as the priſoners eſcape, this ſhall not excuſe the eſcape, for the gaoler may have his remedy over. 2 *Mod.* 28. *R. Raym.* 651.

If the priſoners eſcape by ſudden fire, this ſhall excuſe the ſheriff, for it is the act of God. 10 *Vin. Abr.* 86. *pl.* 6.

Where two are bound jointly and ſeverally, and one is in execution, and the gaoler ſuffers him to eſcape voluntarily, this cannot be pleaded by the other, for it is no diſcharge of the debt, and by conſequence the action lies againſt the other; now where two are bound jointly and ſeverally, one was condemned and taken in execution, and after the other two was ſued, condemned and taken, the firſt eſcapes, the other ſhall not have a writ of *audita querela*, becauſe it muſt be an execution with ſatisfaction; and though the plaintiff may have debt on eſcape againſt the ſheriff, yet there ought to be ſatisfaction in fact, before the writ of *audita querela* lies, and perhaps the ſheriff is worth nothing. And if the defendant were ſued by one writ and ſeveral *præcipes*, although the entry ſhould be *quod unica fiat executio*, this is intended to be with ſatisfaction, for he ſhall have both their bodies. But if two are taken in execution for debt, and one eſcapes, an action of *debt* lies againſt the ſheriff; and after the ſame is recovered againſt the ſheriff, or againſt the other, the other which remains in execution ſhall have a writ of *audita querela* to be relieved, but the body taken in execution is no ſatisfaction for the debt. *Danv. Abr.* 635. *pi.* 11. *Rol. Abr.* 903. *pl.* 22. *Mo.* 459. *pl.* 5 *Co.* 86. *Cro. Eliz.* 4, 7, 8. *Cro. Jac.* 351. *pl.* 555. *pl.* 573. *pl.* 2 *Bulſtr.* 321.

The eſcape of one joint or ſeveral obligor, where both are in execution, ſhall not diſcharge the other. *Hob.* 2, 59, 560.

The eſcape of one in execution, where two are bound in a bond, is no plea to the bond; and though he eſcaped by the voluntary permiſſion of the ſheriff, ſo as the plaintiff is entitled to an action

againſt the ſheriff, yet that ſhall not deprive him of his remedy againſt the other obligor: but if he had pleaded, that the ſheriff ſuffered him to go at large by the licenſe of the plaintiff, it might have been pleaded in diſcharge. *Cro. Cnr.* 75. *pl.* 4.

*G.* and *A.* were jointly bound to *J.* in a bond of 7000 *l.* the obligee takes ſeveral actions, and had two ſeveral judgments, and ſued both to outlawry, and *A.* was taken upon a *cap' utlegat'* by the ſheriff of *D.* who voluntarily ſuffered him to eſcape. *J.* brought *debt* againſt the ſheriff, and recovered and received ſatisfaction, and proceeded to take *A.* but *A.* brought a writ of *audita querela:* and he failed in his declaration, becauſe the ſatisfaction made by the plaintiff to the ſheriff was not ſpecially pleaded, *(viz.)* time and place where it was made; for it is iſſuable, and it may be made after the *audita querela* purchaſed. But if *J.* had recovered only damages in the action on the caſe for the eſcape, the plaintiff ſhould have had no *audita querela*; but here he recovered his original debt in an action of debt, grounded on the eſcape. *Mod. Rep.* 170.

On the eſcape of any one on a joint judgment and execution, the debt lies for the whole; eſpecially if they be in ſeveral priſons. Though the duty wholly ſurvived by the death of the party eſcaped before any action brought, and though the executor of the party dead is diſcharged.

It has been doubted, whether the death of one before the action brought does diſcharge the eſcape. By *Hale* and *Rainsford* it does not; by *Wild* and *Twiſden* it does. 3 *Keb. Rep.* 305. *pl.* 47.

If the ſuit be in the admiralty for a matter ariſing *ſuper altum mare*, and on this the defendant is in execution and eſcapes, the plaintiff may have an action for this eſcape in *B. R.*

An action on the *caſe* for an eſcape lies at *common law*, but no action of debt lays at *common law*; but the party was driven to his ſpecial action on the caſe, which action was grounded on a *treſpaſs* or *tort*, and not on any contract in deed or law. *Rol. Abr.* 536.

An action of *debt* lies againſt the ſheriff or gaoler for an eſcape on the ſtatute of *W.* 2. *c.* 11. and 1 R. 2. *c.* 12. gave debt againſt the warden of the *Fleet*; and ſo it is in equity againſt the marſhal; and though the ſtatute limits the action to be brought by a writ of *debt* which is by original; yet a bill of debt lies by the equity of theſe ſtatutes. And foraſmuch as this ſtatute gives remedy by debt, it gives damages alſo. 2 *Stra.* 873. *Barnard. K. B.* 354.

*Note.* This act does extend to *feme coverts'* and keepers of gaols for eſcape of priſoners in execution. *Leon.* 17. *Cro. Jac.* 658.

*A.* levies a plaint in the sheriff's court of *London* against *B.* who was in custody on a former plaint by *C.* and then *B.* escapes, (*i. e.* out of the sheriff's counter.) *A.* may have an action of escape against the sheriffs of *London.* Salk. 273.

An action on the case lies not for escape on arrest in mesne process; but upon execution it doth. *Rol. Rep.* 440. *pl.* 5. 3 *Bulst.* 198. *Cro. Jac.* 419. *pl.* 10. *Mo.* 852. *pl.* 1162. *Rol. Rep.* 388. *pl.* 9.

If a man be arrested on a mesne process at the suit of *J. S.* and he escapes, *J. S.* shall have a special action against the sheriff on this escape. *Ro.. Abr.* 99. 10 *Vin. Abr.* 85. *pl.* 1, 2.

If a man sue out a *latitat*, to the intent to declare against the defendant after arrest *in custod' maresc'* in an action of debt, and the sheriff arrests him, and suffers him to escape, an action lies against the sheriff shewing this special matter, and he shall recover his damages, having regard to the loss of his debt. *Rol. Abr.* 537

A person brought an action against *J. S.* before the mayor, bailiffs and stewards of *N.* where the bailiffs are the gaolers of the town prison, and *J. S.* is committed to the bailiffs on mesne process for want of bail, and they let him at large before judgment and execution, and after the plaintiff recovers against him. The plaintiff may have a special action against the bailiffs for the escape; for by it he is deprived of the speedy means to have him in execution after the judgment. *Rol. Ab.* 99.

If the sheriff suffers one taken by him in execution to escape, the party at whose suit he was taken in execution, may have an *alias capias* against the party that escaped, to take him again in execution, or an action on the case against the sheriff. *Lil. Abr.* 725.

If the sheriff takes one by *capias ad satisfaciend'* in debt, if he after permits him to go at large, and returns not the writ, yet an action of debt lies on this escape; for there is a record of which the party shall take advantage, though the writ be not returned. *Cro. Eliz.* 17. *pl.* 8.

An action on the case, on an escape of one brought in execution by force of a *cap. utlegat'*, is *tam pro dom' rege quam pro seipso*; and the party shall have all in damages. *Fitsgib.* 265. 2 *Stra.* 901.

An action on the case, *tam pro dom' rege quam pro seipso*, was brought, for that he had a *capias utlegat'* after judgment against *J. S.* and delivered it to the sheriff of *D.* to execute it, who seeing *J. S.* and being desired to execute it, would not do it, but sufferred him to go

at large, and afterwards the ſaid ſheriff returned *non eſt inventus*. *Per cur.*—The action is well brought, and the King is to have the benefit thereof as well as the party. And in his declaration he need not cite the whole record, but begin at the judgment *quod cum recuperaſſet*, &c. for it is but a conveyance to the action, and it is not neceſſary to ſhew the whole record; and it ſuffices to begin at that which is the cauſe of action. *Cro. Jac.* 532. *Cro. Eliz.* 877. *Cro. Jac.* 360.

This is to be conſidered in the caſe of a *capias utlegat'*, or a *capias pro fine*; or where one ſhall be ſaid to be in execution without prayer of the party, and where not.

If a *cap. ad ſatisfac.* iſſue on a judgment in action of debt, and the ſheriff return *non eſt inventus*, and thereupon he is outlawed; and afterwards a *cap. utlegat* iſſues out againſt him, on which he is taken and impriſoned, and after is permitted to go at large; the party who recovered ſhall have action of *debt* on this eſcape againſt the ſheriff; for he was in execution againſt him alſo, becauſe he cannot have a new *capias ad ſatisfaciend'*. And if he eſcape, although he was taken at the King's ſuit, yet the party had ſuch intereſt in the body, that he ſhall have action of eſcape againſt the ſheriff; and before the Plaintiff's prayer to have him in execution, he is in execution at his election. So that if the ſheriff ſuffer him to go at large before the plaintiff has determined his election, it is an eſcape againſt the plaintiff, if he will, and an action of debt lies. *Yelv.* 20. *Rol. Abr.* 810.

*A.* recovers in debt *v. D. in banco commune*, and ſues a *capias ad ſatisfac.* and an *ex poſt cap'*, and outlaws the defendant, who brought error in *B. R.* and judgment affirmed, and within the year a *cap' utlegat'* is awarded, and the defendant taken, and the ſheriff ſuffers him to eſcape before the return of the writ; action lies againſt the ſheriff. The defendant here being taken by *cap' utlegat'* out of the *King's Bench*, ſhall be in execution for the plaintiff preſently after the arreſt, if he will, although he was never brought into court, nor the court committed him in execution for the party. 5 *Co.* 88. *Cro. Eliz.* 706. *pl.* 28. See *Sid.* 380. *Yelv.* 20. 5 *Mod.* 201. 10 *Vin. Abr.*

In all caſes where the plaintiff may have a *capias ad ſatisfaciend'*, and the defendant is taken by *capias pro fine*, he ſhall be in execution for the plaintiff, if he will, without prayer: as a *capias pro fine* on recovery in *aſſumpſit*, and alſo a *cap' ad ſatisfac'* returnable the ſame term at one and the ſame return; and as to the *capias pro fine* the ſheriff returns *cepi corpus*; and as to the *cap' ad ſatisfaciend'*, *non eſt inventus*. If the ſheriff in ſuch caſes takes the party by *capias pro fine*, now upon this taking he is in execution for the party; and if the

the ſheriff let him go at large, he ſhall anſwer for the eſcape. *Leon.* 51. *pl.* 65.

If a man be taken by a *cap' pro fine* for denying his deed in the action of *debt*, and is ſuffered to go at large, he who recovers ſhall have debt againſt the ſheriff; for the *cap'* is *ad reſpondend' tam nobis quam parti.* 7 H. 4. 4.

In recovery on forger of falſe deeds, if the defendant be impriſoned for the fine at the prayer of the King's attorney, if he be ſuffered to go at large before ſatisfaction to the plaintiff, he may charge him for the eſcape, becauſe he is in execution to the party upon the priſal at his election. For he ought to be in execution at the ſuit of the party, before ſuit to the King, becauſe the ſuit of the party is the original: and the time but acceſſary, becauſe of the ſuit. 7 *H.* 6. 6. *b.*

If a man be taken by *capias pro fine* for the King, where no *capias* lies in the original, (as in aſſize with force, &c.) and ſuffered to eſcape before prayer of the party to be in execution for his damages, the party ſhall not have an action of eſcape againſt the ſheriff, becauſe he would not be in execution for him before the prayer.

As for the pleading to *eſcapes* directly, the defendant either denies the *eſcape*, and then he pleads *non permiſit ire ad largum*, or elſe he confeſſes the *eſcape*; but pleads that he made *freſh purſuit*, or that he eſcaped by licence of the plaintiff.

Though the priſoner that eſcapes be out of the view, yet if he be taken *in recenti executione*, he ſhall be in execution again; and though he fly into another county where the ſheriff had not power, yet foraſmuch as the eſcape was of his own wrong, (whereof he ſhall not take advantage) the ſheriff may retake him in another county, and he ſhall be in execution. And freſh purſuit is not, that he muſt have him always in his view; but if he makes freſh purſuit, ſo that it does not appear fully there was a default in the ſheriff in his purſuit, though he be a day and a night out of his view, yet he ſhall be ſaid to be in execution for the party againſt his will on the retaking; as if the priſoner eſcape to an houſe, and the ſheriff ſets a watch and takes him when he comes out.

If the gaoler makes a freſh purſuit before any action commenced, and he is retaken, the gaoler ſhall be excuſed; but it is otherwiſe if before the priſoner be retaken the party brings his action, for at the time of the action brought he had good cauſe of action: but it ſeems by *Winch* 53. that retaking on freſh ſuit after action is good, but not after iſſue joined. *Cro. Jac.* 657. *pl.* 8.

An attorney of *C. B.* was in execution in *N.* for 1000*l.* and he by practice procured himself to be removed by *habeas corpus* before *Coke* Chief Justice, at the assizes in *Lent*, and then escaped to *London*, and in *Easter* term following the bailiff did retake him. The opinion of the court was, that the fresh suit made was good, though he took him again at the end of the year, if enquiry was made after him, and so by consequence an action for false imprisonment against the bailiff did not lie. *Godb.* 177. *pl.* 247

If the plaintiff bring his action before the sheriff retake him, or if the sheriff does not make fresh pursuit, yet in both cases the sheriff may retake him, and keep his body in custody till he agree with him, or he may have an action on the case for his *tortious* escape. And where the prisoner escapes of his own wrong, and is retaken, he shall never have an *audita querela* against the sheriff; but if he escapes with the consent of the gaoler, he cannot retake him: and if he do, the party shall have an *audita querela*. If one in execution escape, the sheriff may not retake but on fresh pursuit; but he shall have action on the case against him, or *trespass quare prisonam fregit*. 3 Co. 52. Poph. 41. Jo. 145. pl. 2. Cro. Jac. 657. pl. 8. 2 Rol. Rep. 282, 283.

If a prisoner escapes, and the gaoler makes fresh pursuit, and before he has taken him the prisoner dies; this is the act of God, and yet because it was once an escape, the action of escape lies against the gaoler. *Poph.* 186.

On escape, the sheriff may not in fresh pursuit enter into the house of *J. D.* and break the chest of *J. N.* to search for the prisoner. 2 *Rol. Abr.* 564.

If a man in execution in the county of *D.* escapes into the county of *S.* where he is taken in execution at another man's suit, and after the sheriff of *D.* on fresh pursuit finds him in prison in *S.* it is made a question, how he may charge the sheriff of *S.* with the first execution, or put the party in execution, seeing he shall not retake him. *Rol. Abr.* 902.

Though information lies against the sheriff for escape, yet it lies not on escape after taking by fresh pursuit, no more, though the information be depending before the taking, so that the officer's diligence appear. 2 *Keb. Rep.* 384. *pl.* 54.

The plaintiff counts of an escape in *L.* and the defendant justifies the retaking in *D.* so that the escape at *L.* is not answered, it is nought on demurrer; but when the defendant by his replication denies not the fresh suit, by protestation relies on this, that he was out of the view, (which is not material, for it is not the form of pleading

ing to say he had him in his view, &c.) it appeared not to the court that he had cause of action; now this bar is sufficient for the matter, but insufficient for the form, and there being no demurrer, but a replication, no advantage shall be taken of the bar for matter of form. 3 *Co.* 52. *Poph.* 41.

An action on the case for a voluntary escape; defendant pleads, he escaped in *November* by negligence, and traversed not voluntarily, and that he freshly pursued and took him, and that *postea, viz.* 27 *Aug.* he died; to which the plaintiff demurred, because before the escape, and especially for the void traverse. *Per cur.*—The alledging the voluntary escape is immaterial, and the sheriff chargable without it, and he need not traverse the voluntary escape; but because he does not say he did *ante exhibitionem billæ*, judgment for the plaintiff. 3 *Keb. Rep.* 55. *pl.* 35.

The plaintiff declared of an escape voluntary, the defendant shews a negligent escape, it is good without a traverse. *Latch.* 203.

In an action of debt on escape, plaintiff declares, that the defendant (sheriff of *D.*) suffered one *C.* who was in execution, to escape in *L.* 18 *Dec.* defendant pleads, that the said *C.* escaped the 16 *Dec.* in *com. D.* and that he freshly pursued him, and retook him the 17 *Dec.* and retained him again in execution, *absque hoc*, that he is guilty *alit' vel alio modo.* On this it is demurred, because the escape is supposed to be the 18th of *December*, and he pleads the escape the 16th of *December*, and the retaking the 17th of *December*; and so he answers not to the escape mentioned in the declaration, for the traverse *aliter vel alio modo* doth not answer to that time, but to the manner of any thing alledged. *Per cur.*—The plea is ill. *Cro. Eliz.* 439. *pl.* 55.

On *nihil debet* pleaded in escape, fresh pursuit may be given in evidence; so a release, or any thing that destroys the duty. *Mod.* 116. 3 *Keb. Rep.* 306. *pl.* 47.

In an action of *debt* for an escape is not within the statute of limitation, though action on the case is. The words of the statute are, "All actions of debt grounded on any lending or contract, without specialty, shall be brought within *six years.*" Sid. 305, 306, pl. 14. Saund. 58. Lev. 191.

Now first, this action is not founded on any lending or contract; here is a duty created by the law without lending or contract. 2 *Inst.* 388.

2. This action is founded on a specialty, *(viz.)* on a statute law; for at common law no debt on escape lay against a gaoler &c. of one

out

out of execution. And the ſtatute of 1 *R.* 2. *c.* 12. gives the action of debt againſt the warden of the *Fleet*; and this ſtatute by conſtruction, extends to all other gaolers and ſheriffs. *Saund.* 37, 38. *Lev.* 191. *Sid.* 305. *pl.* 14.

The ſheriff brought an action on the caſe againſt *J.* for making his eſcape out of execution; defendant pleads confeſſing all the matter, and that after this eſcape, he, at whoſe ſuit he was condemned, had acknowledged ſatisfaction on record. To which it was demurred. *Per cur.*—The plea is good, becauſe the defendant is to be charged, for that the plaintiffs are chargeable with the debt, and not otherwiſe; and the defendant hath pleaded ſatisfaction acknowledged on record, which may by his means, and is not denied; for otherwiſe the plaintiff might have ſhewed the ſpecial matter by replication. *Cro. Eliz.* 237. *pl.* 3. *Leon* 237. *pl.* 321.

Accord with ſatisfaction is no plea.

In *ſcire fac'* on judgment in eſcape on *oyer*, the defendant pleads *executio non*, becauſe that after the judgment the defendant aſſigned the obligation of ſecurity of *T.* the party who eſcaped, which the plaintiff received and accepted. To which the plaintiff demurred. *Per cur.*—Accord with ſatisfaction is not pleadable after a judgment. 3 *Keb. Rep.* 255. *pl.* 89.

In *debt* on eſcape againſt the ſheriff on a *capias utlegat'* after judgment. Defendant pleads there was no ſuch record of the debt and damages. It is a good plea on demurrer. *Brownl.* 51. *Hob.* 209. *pl.* 263.

In debt on eſcape one may plead, that the plaintiff commanded him to let him out of execution. *Cro. Car.* 329. *pl.* 12.

In *ſcire fac'* on a recognizance, as bail in a writ of error in the *Exchequer-chamber*. The defendant pleads, that the plaintiff ſued a *capias ad ſatisfaciend'* out of the *King's Bench* to the ſheriff of *Middleſex*, and he was taken in execution thereon, and ſuffered to eſcape by the plaintiff's conſent. The plaintiff demurs, becauſe they do not lay a place where the court was held, nor where the party eſcaped by conſent. 2 *Keb. Rep.* 567. *pl.* 73. *Mod. Rep.* 19.

Payment of the money to the marſhal is no bar, but payment to the ſheriff on a *fieri fac'* is good; for he is commanded to levy the money, *&c.* but no ſuch authority is given to the marſhal. 2 *Jo.* 97.

In eſcape, the defendant pleads a releaſe of him who recovered, to the priſoner, being in execution; it is holden no plea in debt on eſcape. 19 *H.* 6. 14.

In

In case for the escape of *M. O.* the declaration set forth, that *Mich.* 2 *Geo.* in *C. B.* the plaintiff recovered judgment against her for 232 *l.* which coming into *B. R.* by writ of error, the writ was *non pros*, and execution awarded, which judgment is still in force: and 12 *June* 2 *Geo.* the said *O.* surrendered herself to the *Fleet* in discharge of her bail, from whence she was removed by *habeas corpus* to *Newgate una cum die & causa, &c.* where the plaintiff intended to charge her in execution, but the defendants, sheriff of *Middlesex*, voluntarily permitted her to escape. The defendants confess the said *O.* in their custody, *prout, &c.* but say that 20 *Junii* a *habeas corpus* was delivered to them, requiring them to bring her to the Chief Justice's chamber, upon which they made a warrant to their bailiff, commanding him to carry her and bring her safe back again, by virtue of which he took her out of *Newgate*, and in carrying her along she was rescued. The plaintiff demurs, and the plaintiff took three exceptions to the manner of pleading.

1. It is improperly pleaded; they should not have set forth the fact, but the operation of law resulting from that fact: therefore pleading the rescue from the bailiff is wrong; it ought to have been as from the sheriff, for the law takes no notice of a bailiff, or his acts.

In *Coke*'s case, *Hil.* 2 *Geo.* a rescue was returned on a bill of *Middlesex* in this form:

That a *capias ad satisfaciendum* issued out to the sheriff, who thereupon took the debtor, and the rescue was made of the prisoner under that arrest; exception was taken, that this return was only argumentative, because an escape of one in custody of the sheriff is an escape for all suits wherein he had process. The return indeed was held good, it being *veritas facti*; but the court held it would have been otherwise in pleading. 2 *Saund.* 97. If one jointenant pleads that the other *concessit* to him, it is ill; for it should have been pleaded as a release, that being the only proper conveyance between jointenants. 2 *Vent.* 149. 266. 3 *Lev.* 290, That wrs pleaded as a grant, which could only enure as a covenant to stand seised; and the plea was held ill, for it ought to have been pleaded according to the effect of it in law. *Salk.* 8, 274.

2. The defendants ought to have averred, that she was not afterwards found *in balliva sua*. Dalt. 215, 216. Officina Brevium 203, 204, 217, 226.

3. The *habeas corpus* requires her to be brought *sub salvo et securo conductu*, but the defendants have not shewn that they complied with this direction; and this they ought to do, when theey plead a rescue.

The

The principal point, whether the reſcue here pleaded be a ſufficient excuſe, I muſt obſerve, that ſuch returns have never been favoured, becauſe there may be fraud and combination impoſſible to be diſcovered, and they infer a reflection upon the King, by ſuppoſing an unlawful force, as appears by *Weſt.* 2. *c.* 39. which recites, that the ſheriffs *multotiens falſum dant reſponſum, mandando quod non potuerunt exequi præceptum regis propter reſiſtentiam:* and concludes, *Caveant vicecomites de cætero, quod hujuſmodi reſponſio redundat in dedecus domini regis et coronæ ſuæ.*

A return of a reſcue may diſcharge the ſheriff againſt the King, but not againſt the party.

Formerly ſuch a return of a reſcue upon *meſne proceſs* was held not pleadable, becauſe the ſheriff might take ſufficient power of the county. *Cro. Eliz.* 868. But ſince in the caſe of *May* v. *Proby. Cro. Jac.* 419. 3 *Bulſtr.* 198. *Moor* 852. *Rol. Abr.* 807. it has been reſolved, that the arreſt being on *meſne proceſs*, and not upon execution, the ſheriff is not bound to take the *poſſe comitatus*, and therefore *reſcous* is a good return: but if the priſoner had been once in gaol, the ſheriff ought to keep him at his peril, and *reſcous* is no excuſe, for he is to take care that his priſon be ſtrong enough to keep the priſoners. And upon proceſs of execution, ſuch a return is no excuſe againſt the King or the party, for the proceſs being once executed, the party can have no other. From this caſe I draw two inferences,

1. That when the priſoner is once in gaol, a reſcue thence will be no excuſe to the ſheriff. *Rol. Abr.* 807. *pl.* 3. 33 *H.* 6. 1. 4 *Co.* 84. *a.* is a much ſtronger caſe than the preſent; for there it is held that if rebel ſubjects break the priſon, whereby the priſoners eſcape, this is no excuſe, though it is otherwiſe where it is done by foreign enemies. In 33 *H.* 6. 1. the caſe was adjourned; but in 16 *Ed.* 4. 3. it is reſolved by all the judges: and the marſhal of *B. R.* was forced to get an act of parliament.

2. The other inference is, that wherever the ſheriff may raiſe the *poſſe*, he is not excuſable for a *reſcous*, becauſe no power is by intendment able to reſiſt the ſheriff and his *poſſe*. 8 *H.* 4. 19. The priſoner here is to be taken to be in actual cuſtody. It cannot be intended the *habeas corpus* was ſued out at the inſtance of the plaintiff, and the ſheriff might have raiſed the *poſſe*; the very words of the writ ſuppoſe it, *ſub ſalvo et ſecuro conductu.* Since it appeaas therefore, that the ſheriff is liable for the reſcue of one in execution, and for a reſcue out of the priſon where the cuſtody is on *meſne proceſs* only, becauſe in theſe caſes he may raiſe the *poſſe*; I can ſee no reaſon to diſtinguiſh this caſe from thoſe, and why he may not have the *poſſe* in one as well as in the other.

On

On the other ſide it was held, as to the firſt objection, we may plead either according to the truth of the fact, or the operation of the law upon that fact, and either way is good. *Palm.* 532. 2. We have confeſſed and avoided the eſcape, and the caſes cited are of returns, where it may be neceſſary to ſay, the party was not afterwards to be found in his bailiwick, becauſe, according to the latter reſolutions, *Ventr.* 269. which denies the ſheriff of *Eſſex*'s caſe in *Hob.* 202. the priſoner may be retaken, and therefore the return muſt anſwer every poſſibility, which need not be done in pleading.

The third objection depends upon the principal point, as to which I muſt obſerve, it appears *O.* was not in execution, for which reaſon caſe was brought, becauſe the 1 *Rich.* 2. *c.* 12. gives debt only for the eſcape of one in execution. 11 *Hen.* 4. 11. *A.* wounds *B.* and being in the cuſtody of the conſtable, eſcapes, and then *B.* dies; the conſtable is not anſwerable as for the eſcape of a felon. *Salk.* 614. 2 *Mod. caſe* 158. At this day a reſcue upon *meſne proceſs* is a good excuſe, though the former opinions were otherwiſe. 3 *Lev.* 46. 2 *Lev.* 144. & 2 *Cro.* 419. there is a great difference between priſoners at large, and thoſe in actual cuſtody; the latter by *Weſtm.* 2. *c.* 11. may be kept in irons: but that extends only to ſuch as are within the walls of the priſon. One in cuſtody out of the priſon is not required to have ſo ſtrict a guard, and therefore though a reſcue out of the gaol of one in upon *meſne* proceſs makes the ſheriff liable, yet he is not ſo for the reſcue of a perſon not carried to gaol. On a *habeas corpus* the ſheriff may go out of the way with the priſoner, provided he has him ready at the return of the writ. 3 *Co.* 44. *a* The ſheriff is obliged to bring out the party in obedience to the King's writ, and he is not compellable to have a ſtricter guard than for a perſon arreſted on *meſne* proceſs. A common *capias* has the words *ſalvo cuſtodias* as well as *habeas corpus*; ſo no inference can be drawn from the wording of the writ. The reaſon why the ſheriff ſhall raiſe the *poſſe*, in caſe of execution, doth not hold in this caſe; for the party doth not loſe his debt, nor even his proceſs, for there may be a re-caption. The ſtatute of *Marleberge*, *c.* 21. & *Weſtm.* 1. *c.* 17. *Weſtm.* 2. *c.* 39. are but in affirmance of the common law. 2 *Inſt.* 454. For the ſheriff might have had the *poſſe* before. But though he may, yet he is not obliged to raiſe the *poſſe* upon every occaſion; for it is to be preſumed men will act according to law, and the contrary is never ſuppoſed. 10 *H.* 7. 26. The ſheriff in this caſe might plead a re-caption. *Godb.* 177. And as on a *habeas corpus* he may let the priſoner go out of the way, it ſhews he is only conſidered as a perſon in cuſtody upon *meſne* proceſs; eſcapes being ſo penal, the judges have always made a favourable conſtruction for the officers. 3 *Co.* 44. *a.*

In reply it was held, that it was more than a cuſtody on *meſne* proceſs. The demand *tranſit in rem judicatam*, and if the ſheriff is not liable, it will be very eaſy to bring a *habeas corpus* for no other end but to let the priſoner eſcape.

*Chief Juſtice.* On this caſe the fact pleaded is true, *viz.* that ſhe was in the cuſtody of the bailiff, and reſcued from him; and though this amounts in law to the cuſtody of the ſheriff, yet it differs from the caſes of grants, for there the fact was not true. It was not a grant, but a releaſe, and a covenant to ſtand ſeiſed; but here the fact is true and properly pleaded. 2. The defendants have confeſſed and avoided, and therefore it lay upon the plaintiff to ſhew a re-caption in his replication. The third objection likewiſe has nothing in it, for the words of a common *capias* are as ſtrong.

As to the principal point, I cannot ſee how this caſe is diſtinguiſhed from a cuſtody on *meſne* proceſs, where a reſcue is pleadable. The ſheriff was obliged to bring her out, and as ſhe was not in execution, ſhe can only be ſaid to be in upon *meſne* proceſs. *Powys* Juſtice accord.

*Eyre* Juſtice inclined the reſcue was a ſufficient excuſe, and well pleaded.

*Forteſcue* Juſtice *accord*, as to the firſt objection. As to the ſecond, I think the plea ſhould have gone on; and ſaid, ſhe was not found afterwards. As this ſtands, there may be an intendment that ſhe was. As to the third, it appears ſhe was carried by one ſingle officer, which is certainly a neglect. This is a ſort of middle proceſs after the plaintiff has run a long race; and though the crown may command the ſheriff to bring out his priſoner, yet that is without prejudice to the party. She ought to be conveyed as ſecurely as ſhe is kept, and the ſheriff here may have his remedy againſt the reſcuers. He might, before he brought her out, have inſiſted on money to pay a guard.

In *Hil. term*, 7 *Geo.* it was argued a ſecond time for the plaintiff, Whether after judgment, and before any charge in execution, a reſcue on the party's being brought out on a *habeas corpus* be a good excuſe for the ſheriff in an action of eſcape?

To prove it no excuſe, I ſhall conſider, 1. What are the grounds of this action, taking it as intirely new. 2. Compare it with the reſolutions already in the books. 3. The objections that have been, or may be made.

1. To

1. To consider the foundation of such an action; and that is, the damage which the plaintiff has sustained by the neglect of the defendant, which he might have prevented by the use of those means that he had in his power; for the law supposes the *posse* to be a sufficient defence against a rescue, and that no force is able to resist the sheriff and his *posse*. Here is not the act of God, as fire; or any foreign force, as the case of enemies; which I admit are excuses for the sheriff. 33 *Hen.* 6. 1. 16 *Ed.* 4. 3. 4 *Co.* 84. *Rol. Abr.* 808.

The sheriff may, if he pleases, raise the *posse* in execution of any process whatsoever. 2 *Inst.* 193. 3 *Hen.* 7. 1 *Dalt. Sher. cap.* 20. *p.* 104. *cap.* 95. *p.* 354. 5. The plea admits the neglect, and the officer has a fee. 3 *Bulstr.* 212. *Cro. Eliz.* 873. *Vent.* 268. *Winch.* 90. 21 *Ed.* 3. 45. *b.*

2. The cases in the books. I would compare this with the case of a rescue of one taken on *mesne* process before he is carried to gaol.

In Queen *Elizabeth*'s time this question was determined against the sheriff. 3 *Cro.* 868. *Noy* 40. But I admit it has since been resolved otherwise. 3 *Bulstr.* 198. And now it is held, that the sheriff shall not be answerable. 2 *Cro.* 419. *Rol. Abr.* 807. *Dy.* 1. *Lev.* 144. 3 *Lev.* 46.

The taking the law according to the latter resolutions, I shall shew, that the reasons they go on do not affect this case.

1. In the case of *mesne* process, though the sheriff may, yet he is not bound to raise the *posse*. Dalt. 154.

In this case, where the prisoner is conveyed by process after judgment, he ought to take the same caution as if he was on a *capias ad satisfaciendum*, nay a greater, if he observes the words of the *habeas corpus*, which require him to convey the prisoner *sub salvo & securo conductu*. Besides, this is a process not so easy to be renewed as a *capias ad satisfaciendum* or *mesne* process. *Cro. Car.* 240, 255.

2. Another reason why rescue on *mesne* process is an excuse, is, because of the multiplicity of such writs, which are executed at the same time in different parts of the county, which makes it impossible for the sheriff to raise the *posse*; but this is a writ that rarely issues, and there is no danger of having many of them to execute at the same time.

In the case of *mesne* process, the plaintiff has the conduct of that, but the defendant may purchase the *habeas corpus*.

3. The objections are,

1. That we may have our remedy againſt the reſcuers; but will they not ſend us back again to the ſheriff? Beſides, it is a doubt whether the plaintiff has any remedy againſt the reſcuers; the ſheriff indeed has, and therefore he is not hurt by being ſubjected to our action. *Hutt.* 95. 2 *Cro.* 419. *Cro. Eliz.* 53. The wrong is done by both the ſheriff and the reſcuers. *Rol. Abr.* 698. *B.* 3.

2. Say they, Why ſhould the *habeas corpus* put the ſheriff in a worſe condition, when he is obliged to bring her out in obedience to that command? But we ſay, No command of the crown can excuſe him as to the ſubject. *Dy.* 296. *b.* 297. *a.* *Rol. Abr.* 808.

3. It is objected, that this will be a hard caſe upon the ſheriff, who may be ruined by combinations between the plaintiff and defendant. But has not the law furniſhed him with means to prevent any thing of that nature, by inveſting him with a power to raiſe the *poſſe*.

Upon the whole, it appears here has been a neglect, an interruption of the courſe of juſtice, a damage to the plaintiff, for which he ought to have redreſs.

On the other ſide, This is a reſcue of one in cuſtody on *meſne* proceſs only, and not out of the walls of the priſon; for ſhe was brought thence by the King's command, which the ſheriff was bound to obey. And 4 *Co.* 44. it is ſaid, that every thing is to be taken moſt favourably for the officer. In the caſe of a *capias ad ſatisfaciendum*, the reaſon why the ſheriff was liable was, becauſe the party could have no new writ. *Hob.* ſheriff of *Eſſex*'s caſe. Though it is otherwiſe reſolved ſince, that the party himſelf may re-take him. *Sid.* 330. *Lev.* 211. 2 *Keb.* 340. 2 *Lev.* 109, 132. *Ventr.* 267. *Show.* 177. But what if he is reſcued on *meſne* proceſs, and cannot be re-taken, does not the plaintiff loſe his debt as much as in the caſe of an execution? The reaſons now given for that caſe are not given in the books.

This is no more than a cuſtody on *meſne* proceſs out of the walls of the priſon; every common *capias* has the words *ſalvo cuſtodia*, ſo no argument can be drawn from thoſe words in the *habeas corpus*. The ſheriff is liable in no caſe for a reſcue, but where he was obliged to take the *poſſe*, which here he was not. If the ſheriff, after the party is charged in execution, brings him out on a *habeas corpus*, it is no eſcape if he goes out of the direct way. 3 *Co.* 44. *Moor* 257.

And

And as to the objection, that the plaintiff is no party to the ſuing out the *habeas corpus*, is not that the caſe where there are ſeveral proceſſes charged againſt the ſame perſon, and he is reſcued when taken on one only? And though the warrant is to one bailiff only, yet there is no argument of a neglect, becauſe that bailiff had it in his power to raiſe the *poſſe*, without reſorting back to the ſheriff.

*Adjournatur.* And this term *Pratt* Chief Juſtice delivered the reſolution of the court.

It was admitted at the bar, and is not now to be diſputed, but that on the one hand if the ſheriff arreſts the party by virtue of *meſne* proceſs, and he is reſcued as he carries him to gaol, it will be a good excuſe for the ſheriff. *Cro. Jac.* 419.

And on the other hand, if the party be once within the walls of the priſon, though the cuſtody be on *meſne* proceſs only, yet a reſcue from thence by any but common enemies will be no excuſe. If a company of rebels break the priſon, and let out the priſoners, yet the ſheriff is anſwerable, becauſe the law ſuppoſes the ſheriff and his *poſſe* are ſufficient to reſiſt ſuch a force. *Rol. Abr.* 811. 4 *Co.* 84. Theſe, I ſay, are grounds that are not to be diſputed.

The caſe at bar is new, and differs from both theſe; but, however, we muſt take it upon the different reaſons of thoſe caſes. In the caſe of *meſne* proceſs the ſheriff, if he meets the party againſt whom he has ſuch proceſs by accident, and is told it is the defendant, he is bound to arreſt him; and then, becauſe it is not ſuppoſed that he has always the *poſſe* along with him, he is excuſed againſt a reſcue. But in the preſent caſe there is no ſuch danger of ſurprize; he has notice before, that ſuch a day he is to bring the party out of priſon, and it is his duty, and ſo he is directed by the writ, to provide for the ſure and ſafe conduct of the party. Here he has not taken that caution, whereby the plaintiff, who had an intereſt, a ſort of property in the body of the priſoner, has ſuſtained a damage. The damage has happened by the neglect of the ſheriff, and therefore he muſt anſwer it to the plaintiff in this action. Judgment *pro quer'*. Stra. 429.

In treſpaſs and impriſonment the defendant juſtifies by virtue of a *capias*, and the plaintiff did afterwards eſcape, and he being ſheriff did follow him by virtue of the ſaid warrant, and took him upon the *capias*. The plaintiff replied, he eſcaped by licence of the ſheriff, and traverſe of the latter taking by virtue of the warrant.

*Per*

*Per cur.*—The traverſe is idle, becauſe the plaintiff had ſufficiently confeſſed and avoided, and if he eſcaped by the ſheriff's licence, that ought to be the thing put in iſſue, and not the traverſe. *Brownl.* 197.

An action on the caſe upon eſcape was brought againſt a ſerjeant of *London*. He pleads, that the ſheriff commanded him to deliver his priſoner to him, which he did, and traverſed that he was guilty of the eſcape, *aliter vel alio modo*. Per cur.—The ſerjeant is an officer of the ſheriff, and the uſual manner of pleading is to plead, that the priſoner was in cuſtody of the ſheriff; and ſheriffs in *London* may make their houſes their priſons, as well as the counters, and the bar was good, but the traverſe was ill. *Sid.* 318. *pl.* 6. 2 *Keb. Rep.* 147. *pl.* 22.

This plea is a confeſſion and avoidance, and the traverſe is ill. But *per cur.*—Here is no eſcape confeſſed, and therefore *not guilty* ſhould have been pleaded, and not to take a traverſe.

In debt againſt the ſheriffs of *London* upon eſcape of *A.* The plaintiff declared on an execution by force of the recovery, and that the party was in the priſon of *Ludgate*, *ſub. cuſtod. J. S. &c. J. D.* then ſheriffs, 1 *H.* 8. and that he is ſo continued *ſub cuſtodia J. N.* and *J. L.* 3 *H.* 8. and then was ſuffered to eſcape. *J. N.* and *J. L.* pleaded, that before the eſcape at ſuch a day, *Anno ſuperius in narratione ſpecificato*, the ſaid *J. D.* and *J. S adhunc vicecomites* ſuffered him to eſcape.

*Per cur.*—It is no plea, becauſe there were three years ſpecified in the declaration, and it ſhall be taken that it was the firſt or third of *H.* 8. when they were out of their office; yet it is merely induced by the *adtunc vicecomites*, which ſhall lead the intendment to be in the year in which the defendant ſuppoſeth they were ſheriffs.

But *per cur.*—That ſufficeth not, but the plea muſt be alledged in fact; and therefore the defendant's meaning to diſcharge themſelves by former eſcape, which was not in their time, ſhould alledge it preciſely. *Dy.* 66.

In debt for an eſcape of one in execution defendant pleads *nil debet*; and after iſſue, and the cauſe entered for trial, the defendant would acknowledge the action with *relicta verificatione.*

But *per cur.*—This he may not do without the aſſent of the plaintiff; for many defects are aided by verdict. 2 *Jones* 156.

The plaintiff chargeth the defendant with an eſcape 13 *April* 18 *Jac.* and the defendant pleads eſcape 29 *Feb.* 16 *Jac.* which was a year and

and two days before the eſcape alledged by the plaintiff; to which the defendant made no anſwer, and although he concluded it was the ſame eſcape, which makes the plea good where the time is not material, yet in the principal caſe the time ſeems to be material; for the defendant (the marſhal) pleads, that the priſoner was committed to him, by *habeas corpus*, and that he remained in his cuſtody from ſuch a time till ſuch a time, during all which time the plaintiff never prayed to have the ſaid priſoner in execution. *Bridg. Rep.* 7.

In debt for 20*l.* againſt the defendant for eſcape. The plaintiff declares, that he recovered a judgment in ——— againſt *Clerk*, and ſued a writ of execution, *viz.* a *capias ad ſatisfaciendum* directed to the defendant ſheriff of *Eſſex*, to take *Clerk*, which was delivered to the defendant, and that the defendant took him in execution the 16th of *July*, and let him eſcape the 25th of *July* at *London* in *Cheapſide*.

The defendant pleads, that before the 25th of *July*, *viz.* the 17th, a *habeas corpus* iſſued out of the *Common Pleas*, to bring the body of *Clerk* to the *Common Pleas ad tres Michaelis* next following; that this writ was delivered to him, and that he by virtue thereof brought *Clerk* the 18th of *July* from *Chelmsford* by *London* the ſhorteſt way, and at *tres Michaelis* delivered him at the *Common Bench*, to be committed in execution.

The plaintiff, *proteſtando*, that the defendant did not bring *Clerk* by *London*, ſaid that the *habeas corpus* was delivered to him the firſt of *October*, and not before.

The defendant rejoins, that the *habeas corpus* was delivered to him before the firſt of *October*. And the plaintiff demurs. And adjudged for him for an apparent fault in the rejoinder, becauſe the defendant ought to have ſaid, that the writ of *habeas corpus* was delivered to him before he brought *Clerk* out of priſon; for it ſignifies nothing to ſay, that it was delivered before the firſt of *October*, becauſe that appears to be ſubſequent to the time of the eſcape.

But by *Powell* Juſtice, the matter of law is with the plaintiff; for if an *habeas corpus* is delivered to the ſheriff in *July*, to bring a man in execution to the *Common Pleas* next *Michaelmas* term, the ſheriff may take a reaſonable time, of which the court will judge according to the circumſtances; but he cannot bring him out of priſon and keep him out of priſon all the vacation.

*Treby* Chief Juſtice ſaid, that he would not determine that point. And therefore for another reaſon judgment was given for the plaintiff. [See *Hob.* 202.] Ld. *Raym.* 241.

In

In an escape, the defendant confesseth that *H.* was in his custody by *latitat*, returnable *Mercurii craſt. animarum*, but said, that a *superſedeas* came to him (which varied from it) reciting a writ *die Veneris craſtino animarum*; for which variance the plaintiff demurred as being not the same action, which the court agreed. *Keb.* 234. Earl of *Bedford* against *Auſtin.*

In action on escape in debt on judgment, defendant pleads, that after he was arrested, he was discharged by protection shewed to the bailiff, as servant to the Earl of *Bath*. *Per cur.*—The plea is naught. *Keb.* 660. *Cockman* and *Symonds*.

In action on the case on *meſne* process, sheriff pleads, that a writ of privilege came to him *teſte* Marquis of *Newcaſtle*, returnable at sessions; which recites, that by the law of *England*, persons shall be privileged in going to and returning from the sessions. To which the plaintiff demurs, and the court held the plea to be ill; yet the court were in doubt upon a second motion, whether the privilege shall extend to such inferior courts. Also it is ill pleaded, not shewing where the writ issued, nor where the session was, nor whether the discharge were in session. *Sid.* 269. *pl.* 22. *Keb. Rep.* 845. *pl.* 38.

In action on case of escape and false return, if the sheriff demurs generally upon the declaration, he loseth the advantage of pleading. *Stat.* 23 *H.* 6. *c.* 10.

In action of escape, *venire* shall not be changed, nor in debt; for these may be all over *England*. Styl. 107, 241.

By the marshal's privilege, the jury on escape were changed out of *London* into *Middleſex*. 2 *Keb. Rep.* 818. *pl.* 24.

*Hale* said, he knew him after imparlance ousted of this plea; but here the court would not put him to plead it, but granted a trial in *Middleſex*, and escape in *London*, being so every where. *Cro. Eliz.* 625.

*Venire* is most proper to be from the place where the escape was.

Action is brought against the defendant as sheriff for the escape of *R.* in *Norfolk*, and falsely returning *non eſt inventus* in *B. R.* the false return is not the principal, but the escape is the cause of action; and the false return which is also made in *Norfolk* is but aggravation, the party may lay it in either county. *Keb. Rep.* 771. *pl.* 6.

Where the *venire* and return differ, it is not good. *Hetl.* 85.

*Per cur.*—No coſt ſhall be on nonſuit in this action, by the *ſtat.* 32 *H.* 8.

It has been adjudged as well on *ſcire fac'* as in debt, that to plead he was in execution, and *contra voluntatem* of the ſheriff eſcaped, is no plea: no, though it were by permiſſion. See 3 *Keb. Rep.* 305. *pl.* 47. *Cro. Car.* 24.

If the plaintiff order the ſheriff, to let a man, who is in execution at his ſuit, go at large, and he does ſo accordingly; it is a good bar in debt for the eſcape. *Dalt.* 77.

If in ſuch caſe the ſheriff refuſe to let him go at large, an action of falſe impriſonment lies againſt him; and there the lord *Coke* ſays, the ſheriff is bound to take notice of the plaintiff. 3 *Bulſt.* 98. and 2 *Cro.* 379. to the ſame purpoſe. Ld. *Raym.* 555.

To a *ſcire fac'* on recognizance as bail in error, defendant pleads, that the plaintiff after judgment ſued a *capias ad ſatisfaciend'* out of the *King's Bench*, and that the defendant was thereupon taken, and that he eſcaped by conſent of plaintiff.

*Per cur.*—The plea is ill for want of place; it is not ſaid where the court was held, nor whether the party eſcaped by conſent. 2 *Keb. Rep.* 567. *pl.* 73. *Mod.* 10. *pl.* 49.

To *ſcire fac'* on judgment in debt, defendant pleads a *capias ad ſatisfaciend'* iſſued out of the court of *King's Bench*, and that he was taken thereupon, and on *habeas corpus* out of the *Common Bench*, he was committed to the cuſtody of the warden of the *Fleet*, and that the warden ſuffered him voluntarily to eſcape.

To this it was demurred, becauſe he concludes not aright: and *per cur.*—The execution muſt be alledged by matter of record, and therefore he muſt conclude his plea, *prout patet per recordum*: the difference is between proceſs that requires no return, and where the record whereby he is committed is ſhewed, the *committitur* in an action of eſcape is but inducement, but in a juſtification it is a ſubſtance. Upon a *capias* or *latitat* he need not ſo conclude, but here is a matter of record alſo, here the matter of the bar is not the matter of fact, but the having ſued out execution on record. And ſecondly, It is all one as to the party, whether he eſcape by the ſheriff's negligence, or voluntarily. If the party negligently eſcape, the party and the ſheriff may take him again; but if voluntarily, then only the party may take him again, but not the ſheriff; but if the ſheriff let him go by conſent of the plaintiff, then neither can take him; and bar by voluntary eſcape is held ill. Judgment *pro quer'*. 2 *Keb. Rep.* 189. *pl.* 21, 206. *pl.* 43. *Sid.* 330. *pl.* 12.

In *audita querela*, voluntary escape in the sheriff is no good surmise, but that the sheriff may retake him again. *Rol. Abr.* 902. *Hob.* 202.

In debt for escape on *nihil debet* pleaded, the defendant may give fresh pursuit in evidence. And by *Hale*, at a trial at bar, said, He always let them give in evidence fresh pursuit on *nihil debet*, and by *Wild*, it is done generally. *Mod.* 116. 3 *Keb Rep.* 305. *pl.* 47.

In action against a gaoler upon escape of a prisoner in execution: if the issue be, whether the gaoler immediately after the escape made fresh suit against the prisoner, *&c.* and the evidence is given, that a prisoner escaped out of prison by the negligence of his keeper, and is absent a day and a night, and the keeper knows it not, (having many other prisoners under his care;) but when he had notice of it, he immediately makes fresh suit after him and retook him; this is an immediate fresh suit to maintain the issue, for convenient pursuit is an immediate pursuit in law. 2 *Rol. Abr.* 681.

On evidence at the bar, where the evidence was, that he escaped at nine o'clock at night, and the notice and fresh suit on which he was retaken, was the next morning at nine o'clock.

Issue was, whether *A.* was taken by a *capias* at the suit of *B.* and evidence was taken by a *capias* at the suit of *C.* and then a delivery of *capias* at the suit of *B.* to the sheriff; it is good evidence; for though he were taken before, yet this is a new taking in law as to this execution. So if the issue be of a taking on a *capias utlegat*,' or *prò fine* with a prayer of the plaintiff, that he may remain for satisfaction.

Issue was, whether *J. S.* was taken with a *capias*? Evidence was given by an *alias capias*, and good. *Hob.* 54.

In debt on escape against the marshal, and *nil debet* pleaded, the evidence was an *habeas corpus ad testificand'*, and that the prisoner went down too long before-hand, and staid too long after the assizes were done at *Wells*, and that he went sixty miles beyond *Wells* before he returned again. *Verdict pro quer'* for 620. *l.* *Mod.* 116.

In escape upon a *capias* returned, *ne unques en son gard* shall be tried by record. But upon a *capias* not returned, the prisal shall be tried *per pais*. 2 Rol. Abr. 574.

The imprisonment upon the execution, and not for other cases in escape, shall be tried by the record. But in escape against the mayor of a staple, for suffering *J. S.* in execution upon a statute staple to go at large, if the defendant say he was not in prison upon the execution, but upon plaint there, this shall be tried *per pais*, and not by record; because

becauſe it would be unreaſonable the defendant ſhould certify a record where he himſelf was concerned.

In eſcape upon arreſt in one county, and eſcape in another county; upon *not guilty*, this ſhall be tried where the eſcape is laid, for the action is upon the eſcape. *Roſ. Abr.* 602.

An action on the caſe againſt a ſheriff upon eſcape in *London*, and the arreſt laid to be in *Southampton*. *Per cur.*—The *viſne* ſhall be where the eſcape was, becauſe that is the ground of the action, and not where the arreſt was. *Cro. Eliz.* 271. *pl.* 1.

*Note*; In action on the caſe for eſcape or deceit, the court will not change the *viſne* out of the county where the plaintiff ſuppoſeth the thing to be done. *Sid.* 87.

In action on the caſe againſt the ſheriff of *York* for an eſcape, and declares that he arreſted the priſoner in the ſaid county, and after ſuffered him to eſcape at *D.* in *com'* *Nottingham*. To which the defendant pleads *not guilty*. This iſſue may be tried by the county of *Nottingham* only, without joining the county of *York*; for the action and iſſue is upon the eſcape, and not upon the arreſt.

Debt againſt the marſhal for ſuffering *T. B.* in execution at the plaintiff's ſuit to eſcape; pleads, he did not ſuffer him to eſcape; and gives in evidence, that *T. B.* brought attaint to reverſe the judgment, and upon his prayer the court bailed him, that he might proſecute the ſuit with effect. But this bail was not entered of record. And the court held it good evidence. The eſcape ſuppoſed here is for letting him go by bail, which is the act of the court, and not of the marſhal, and may well be given in evidence. *Cro. El.* 5.

By *Wray*: Upon execution ſued after verdict, although the party ſues attaint, the court uſually does not bail him, for the verdict is intended true till reverſed, but on good conſiderations they may. And though the bail be not entered, yet the plaintiff for his benefit may cauſe it to be entered, and then he may have a *ſcire fac'* on the bail, and ſo is not at any miſchief.

The party being charged in *meſne* proceſs when he was in cuſtody, the evidence may be good without proving any *committitur*: but if he were in execution, the *committitur* upon the roll ſhall be proved. *Sid.* 237.

In debt *ſur eſcape*, if the defendant plead *nul eſcape*, he cannot give in evidence no arreſt. *Trial per pais* 174. *Clayt.* 34.

The queſtion was, if the confeſſion of an under-ſheriff of an eſcape be any evidence againſt the high-ſheriff? And adjudged that it is. For though the ſheriff is ſuable, yet the under-ſheriff gives him a bond to ſave him harmleſs, and therefore it will all fall upon him. And therefore his confeſſion is good evidence, becauſe in effect it charges himſelf. Ld. *Raym.* 190.

In debt on eſcape, if the plaintiff declare of an eſcape of two, and it is found one only was in execution, yet the verdict is good, and the plaintiff ſhall have judgment. *Sid.* 5.

In debt on eſcape, if the plaintiff declares of the eſcape of *Baron* and *Feme* out of execution, on judgment for the debt of the wife *dum ſola*, and the jury find the huſband only was in execution, yet the verdict is good, and the plaintiff ſhall have judgment The jury found not that the wife was taken in execution, (being for debt contracted before coverture.) *Sid.* 5. *Keb. Rep.* 371. *pl.* 68.

Though the verdict finds an erroneous proceſs, yet the ſheriff ſhall not take advantage thereof. As in debt on eſcape, and ſpecial verdict finds an *alias* into another county, without a *capias* in the proper county, and that he was in execution and eſcaped. Judgment *pro quer'* on *Cro. Jac.* 1. *pl.* 1. becauſe the ſheriff is a ſtranger, and ſhall have no advantage thereof. 3 *Keb.* 629. *pl.* 21.

One reſcued himſelf and eſcaped, and the ſheriff brought action on the caſe. On *not guilty*, the jury found de was arreſted the 26th of *Feb.* and then and there reſcued himſelf. *Per cur.*—Be the *reſcous* before or after the day ſuppoſed in the declaration, it is good enough, ſo as it be before the ſuit commenced. *Cro. Eliz.* 53.

The ſheriff having one in cuſtody, takes *aſſumpſit* of *J. S.* to deliver the priſoner to the bailiff in ſafe cuſtody. This is a good *aſſumpſit*, and no eſcape; for the court will not intend that the bailiff was abſent from the priſoner. *Sid.* 132.

In conſideration the plaintiff (who ſueth as bailiff) would permit *J. S.* taken in execution, to reſt in the houſe of *N.* till *Friday* next; if he eſcape, the defendant would pay the debt.

By *Hale*:—The conſideration is good in mean proceſs, but being in execution, it is ill. But the action muſt be brought by the bailiff, or nobody; but conſideration to make a ſpecial bailiff is ſufficient to ſave harmleſs. This is no bond or promiſe taken of the priſoner, or of any for him; therefore it is not within the ſtatute. 2 *Keb. Rep.* 845. *pl.* 61. *Leon.* 132.

The

The bailiff assumes to save the sheriff harmless of all escape, it is not good. The declaration is, that a *ca. sa.* on a judgment was awarded against the defendant to the sheriff of *Suffolk*, who directed his warrant to the plaintiff, as his bailiff, to serve it; and that the plaintiff assumed to the sheriff to save him harmless of all escapes, and that by force of the warrant he arrested the defendant, and the defendant intending to make the plaintiff to be charged, escaped; for which the plaintiff in the first action, brought an action against *J. C.* the sheriff, upon this escape, and recovered, and *J. C.* brought this action on the *assumpsit*.

It was moved in arrest of judgment, that there is no sufficient cause in the declaration to maintain an action, for though the sheriff may have action on the case against the prisoner that escapes, yet the bailiff shall not have it. *Per cur.*—For the bailiff was not chargeable to the sheriff by law, but by *assumpsit*; and this being his voluntary act, shall be no cause to charge the defendant, but shall only make himself chargeable. But they agreed, if the bailiff had been chargeable by law, without such promise, action lay for him against the defendant, who caused him to be charged. *Cro. Eliz.* 349.

In consideration he would permit him to go at large, and of 2 *s.* paid, he promised to pay all the money in which the party was condemned in execution. *Per cur.*—The consideration is not good, being contrary to the statute of 23 *H.* 6. and that a promise and obligation was all one; and though it be joined with another consideration of 2 *s.* yet being void, and against the statute for part, it is void in all. *Cro. Eliz.* 199. *Plowd.* 62.

Plaintiff declared, whereas the defendant was arrested at his suit on process; the defendant, in consideration that he should be permitted to go at large, promised that he would appear at the day of the return, or would give him 10 *l.* and he did not appear at the day. *Per cur.*—It is a good *assumpsit*, being made to the party which had authority to dispense with his appearance. Had it been made to the sheriff, or to any other for his use, it had been within the equity of the statute of 23 *H.* 6. *Cro. Eliz.* 190.

All that are prisoners are such, either by matter of record or matter of fact.

By matter of record, when one present in court is committed to prison by the court, there if the gaoler has not him ready, it is an escape without more enquiry, (unless he had reasonable excuse) and the judges will set the fine presently.

By matter *en fait*, a man is a priſoner when he is arreſted by ſheriff, bailiff, conſtable, *&c.* and eſcapes, there the jury ought to find it, and preſent it before the juſtices, and the juſtices aſſeſs the fine.

Upon a *capias* for felony, the ſheriff returns *cepi corpus*, and hath not the body at the day, and the ſheriff was amerced for the eſcape at 50 *l.*

By ſome it is felony in the ſheriff to ſuffer a priſoner to eſcape. See ſtat. *De frang. priſonam.* If the jaoler ſuffer the eſcape, it is felony in him, and forfeiture of the office. 9 *Co.* 98.

The *ſtat.* of 4 *Ed.* 1. *De frangentibus priſon'*, mitigates the rigour of the common law; for before that ſtatute the breaking of the priſon was felony in every caſe: but now it is not felony, but where the party was committed to priſon for felony. 2 *Leon.* 161.

*Fell*, keeper of *Newgate*, was indicted for the eſcape of *Berkinhead*, who was committed for high treaſon in conſpiring the death of the King. Upon *not guilty* pleaded, verdict for the King. And now Sir *Bartholomew Shower* and Mr. *Northey* moved in arreſt of judgment, that it was ſaid only that *Fell* ſuffered *Berkinhead* to eſcape, being in his cuſtody *oneratum pro alta proditione*, *&c.* and does not ſhew that he was committed for high treaſon to the cuſtody of the defendant. And for this exception judgment was arreſted.

By *Holt* Chief Juſtice, if a man be in cuſtody of *Fell* for a treſpaſs, and another perſon goes before a juſtice of peace, and ſwears high treaſon againſt him, he will be in cuſtody of *Fell*, and alſo charged with high treaſon; but yet, ſince he was not committed to *Fell* for high treaſon, *Fell* ſhall not anſwer for his eſcape, as the eſcape of a man committed for high treaſon. The precedents are, *cujus ex cauſa commiſſus fuit.*

In the caſe for the eſcape of the Lord *Grey* the *mittimus* was ſet out; and though error in the commitment will not excuſe the gaoler, (as if a man be committed for high treaſon, there to continue until further order) if he permits the man committed to eſcape, yet the gaoler ſhall never be charged for the eſcape of the man, as committed for an offence for which he never was committed to him. And he reprehended the King's counſel for not following the ancient precedents. Another exception was, that it was ſaid, *Berkinhead* was committed *priſonæ de Newgate ſub cuſtodia vicecom'*. So that it did not appear that he was committed to the cuſtody of *Fell*; and alſo to ſay, that he was committed *priſonæ*, *&c.* was inſenſible, becauſe a man cannot be committed to a place but to a perſon, *&c.*

To

To the first point they held, that this was well enough: for if *Berkinhead* was committed to the sheriff, and the gaoler permits him to escape, the gaoler is liable, for the prisoner is in the custody of both. And though some scruple has been made whether the sheriff be in such case chargeable, [See *Hale P. C.* 114. the sheriff shall not be charged criminally, *viz.* to extend to life or limb, though he is liable to payment of damages in escape for civil cause] without doubt he is. For by 14 *Ed.* 3. *c.* 10. the sheriff ought to put in such a gaoler as for whom he will be answerable; and by 19 *Hen.* 7. *c.* 10. which restores the gaols to the sheriff, he shall be chargeable for escapes.

*Holt* said, that he made mention of it for the good of sheriffs, and not to cause examinations of what is past.

And as to the second part, *Holt* Chief Justice said, that it was according to the precedents; for commitments *prisonæ et turri London*, are frequent, and such commitment is a good commitment to the lieutenant of the *Tower*.

3. A third exception was, that it did not appear (admitting *Berkinhead* to have been committed to the prison for high treason) that he was under such commitment at the time of the escape; for it may be he was pardoned, *&c.*

This was over-ruled, for *Holt* Chief Justice held, that that ought to come of the other side. And if a man was pardoned, yet the sheriff ought not to take notice of it, until his pardon was allowed in the *King's Bench*, or some other court, for the sheriff cannot allow the King's pardon; and it is criminal in him to permit a prisoner to escape before such allowance had. Lord *Raym.* 424. *Salk.* 271. *pl.* 1. 5 *Mod.* 216. 12 *Mod.* 226. See 2 *Hawk. Pl. Cr.* 128. *to* 139. *chap.* 19, 20. and *H. H. P. C.* 591. *to* 606. *chap.* 51, 52. *Vin. Abr. tit.* Gaoler *and* Marshal.

" If any person committed to the custody of the marshal of the *Queen's Bench*, or to the prison of the *Fleet*, either in execution, or upon *mesne* process, or upon any contempt in not performing any order or decree, by any of her Majesty's courts at *Westminster*, shall, before he shall have made payment or satisfaction to the plaintiff or creditors, or shall have cleared such contempts, escape from the custody of the marshal, or from the prison of the *Fleet*, or go at large; it shall be lawful, upon oath made before any of the judges of the court where such action was entered, or where the party was committed, for such judge to grant unto any person a warrant reciting the actions, executions or contempts, with which such person escaping stood charged, at the suit of any person on whose behalf such warrants shall be demanded, directed to all sheriffs, mayors, bailiffs, constables, headboroughs and tithing men, commanding them,

in

in their reſpective counties and precincts, to retake ſuch perſon eſcaped, and ſuch perſons to convey to the common gaol where they ſhall be retaken, there to remain until they ſhall have made payment to the plaintiffs, or creditors in ſuch actions named, or until the judgments in ſuch executions ſued ſhall be reverſed, or until judgment in ſuch actions be given for ſuch perſons, or until the contempts for which ſuch perſons were committed be cleared, except ſuch perſons be charged with treaſon or felony, or on any other matter in behalf of the Queen: and if he, for any ſuch cauſe on behalf of the Queen, be removed to any other gaol, he ſhall be in ſuch gaol charged with all the cauſes with which he ſhall be charged in the gaol from whence he ſhall be removed. And every mayor or other officer, after delivery of ſuch priſoner, together with ſuch warrant to the ſheriff, ſhall take a note from ſuch ſheriff, teſtifying the receipt of ſuch priſoner; and ſuch ſheriff, after the execution of ſuch warrant, ſhall make a return thereof to the court where the action ſhall be depending, or judgment or decree obtained, which ſhall be filed." Stat. 1 *Ann. ſt.* 2. *c.* 6. *ſect.* 1.

If a perſon charged in execution in the *King's Bench* be turned over to the *Fleet*, and he eſcape, either a judge of the *King's Bench* or *Common Pleas* may grant an eſcape warrant. 2 *Bac. Abr.* 245. 8 *Mod.* 240. 10 *Vin. Abr.* 93. *pl.* 8.

*A.* was committed by *Chancery* for a contempt in reſcuing another taken on Lord Chancellor's warrant; it was held, that *A.* not being ſelf-committed, but only aſſiſting another who was committed, was not within the ſtatute, ſo as that an eſcape warrant would lie againſt him, though it lay againſt the perſon reſcued by him. *Wm's Rep.* 439. 10 *Vin. Abr.* 91.

*Payne*, the father, being in contempt in *Chancery* for non-payment of money, an order is made upon him. *Payne* the ſon reſiſts the ſervice, for which contempt he is committed to the *Fleet*, and turns himſelf over to the *King's Bench*, and goes at large till he is taken up by an eſcape warrant, and committed to *Newgate*.

He moved for a *ſupерſedeas* to that eſcape warrant, the contempt not being ſuch an one as is within 1 *Ann. c.* 6. which ſpeaks only of contempts for not *performing an order*, which *Pyne* the ſon was not obliged to do. *Et per curiam*:—The father would have been within the act, but the ſon is not.

This ſtatute is not be extended by equity, becauſe it is againſt the liberty of the ſubject, and this is a new power given only in particular caſes; this is not one of them, and therefore not within the ſtatute: whereupon the warrant was ſuperſeded, and the marſhal directed

directed to go to *Newgate*, and take him into his cuſtody again, as was done in *Sir Thomas Tippin*'s caſe. *Stra.* 99.

If one who is no officer, by virtue of the warrant ſeizes a perſon eſcaping, and brings him before the ſheriff, he cannot detain him; for being illegally executed, it is the ſame thing as if there had been no warrant at all. 6 *Mod.* 154. *Com. Rep.* 554. *Ld. Raym.* 309, 310, 353. 12 *Mod.* 31, 227, 230. 2 *Bac. Abr.* 245. 10 *Vin. Abr.* 92. *pl.* 6.

If a perſon is taken upon an eſcape warrant at eight in the morning, and the ſame day obtains a day rule, purſuant to a petition, which was not read in court till after eight, yet he ſhall be diſcharged; for as to this purpoſe there ſhall be no fraction of a day. 2 *Bac. Abr.* 245. 10 *Vin. Abr.* 92. *pl.* 7.

The Defendant had been a priſoner in *Woodſtreet* compter in 1732, upon meſne proceſs at the ſuit of *Brown*, plaintiff's inteſtate, and being at that time a ſerjeant at mace, the keeper of the compter ſuffered him to have the liberty of the gate, (as it is called) that is, to have his liberty, *upon promiſe to return into* cuſtody *whenever called upon by the keeper*; the ſaid action having never been diſcharged upon the books of the compter, and *Brown* in his life-time having obtained judgment, the plaintiffs revived the ſame by *ſcire facias*, and having obtained an award of execution charged the defendant (ſtill a priſoner on the books) with a *capias ad ſatisfaciendum*, as a priſoner in cuſtody of the ſheriffs of *London*, whereupon the keeper of the compter endeavoured to perſuade the defendant to return into cuſtody, which he refuſing, the keeper, on *Sunday* Nov. 9, *retook the defendant* at George's coffee-houſe, Temple Bar, *without any warrant*; and defendant moved againſt the keeper to be diſcharged, inſiſting, that as the eſcape was voluntary, the keeper could not retake him, and alſo inſiſting, that the debt was paid to *Brown* in his life-time.

The keeper, on ſhewing cauſe, could not controvert the firſt thing inſiſted on, *viz.* that the eſcape was *voluntary*; and as to payment of the debt, that was out of his knowledge: *Brown*'s action never was diſcharged from the books, and the plaintiffs were not parties to this motion, but there had been a former motion this term by defendant to be diſcharged, the debt being paid; the plaintiffs had anſwered that fact, and ſhewn ſufficient cauſe to keep him in cuſtody.

The eſcape on all hands being admitted to be voluntary, Mr. Juſtice *Denton*, and Mr. Juſtice *Forteſcue* were of opinion, that the keeper could not retake the defendant, and that he ought to diſcharge him. Had the eſcape been real, the keeper might have retaken defendant on a *Sunday*, and is not reſtrained by the ſtatute 29 *Car.* 2.

Mr. Juſtice *Reeve* was of the ſame opinion in point of law, but thought it too much for the court to relieve defendant, who appeared to have acted (at leaſt very diſhonourably with regard to the keeper,) in this ſummary way upon motion, and that defendant ſhould be put to his action, or an *audita querela*. Defendant was ordered to be diſcharged. 10 *Vin. Abr.* 93. *pl.* 7.

A priſoner eſcaped, and was retaken on a *Sunday* by virtue of a judge's warrant.

The queſtion was, whether this taking was ſuch ſervice of proceſs as was againſt the act of 29 *Car.* 2. *cap.* 7? By the whole court: —This is a taking in nature of a freſh purſuit, and is no original proceſs, and the gaoler or party might have taken him upon a freſh purſuit on a *Sunday* before this ſtatute. 6 *Mod.* 95. 2 *Salk.* 626. *pl.* 7. 3 *Salk.* 149. *pl.* 1. *S. P.* 2 *Ld. Raym.* 1028.

On motion that an eſcape warrant might be ſuperſeded, and that the defendant might be diſcharged out of cuſtody. It was ſaid, that the warrant was made out ſo long ago as in the year 1725, and the defendant was taken upon it laſt *October*, and that too by a common bailiff, who executed it without any other authority whatever.

It was obſerved, that an eſcape warrant, made out in the late Queen's time, was held to be of no force after her demiſe, for which reaſon the preſent writ likewiſe, that appears to have been made out in the time of *Geo.* 1. muſt have loſt its force likewiſe by his demiſe.

It was likewiſe ſaid, that it was held, that a common bailiff could not execute ſuch a warrant by virtue of the general words in it, without a particular authority.

The Chief Juſtice ſaid likewiſe, that he remembered an eſcape warrant was ſuperſeded, that was executed after the time that the judge was out of his office that granted it. Accordingly the court made a rule, that the writ ſhould be ſuperſeded, and the defendant diſcharged, unleſs cauſe on the morrow. 2 *Barnard. K. B.* 78.

In *Michaelmas* term 6 *Geo.* the plaintiff brought his action, and the defendant put in bail, and in *Hilary* term following iſſue was joined, and notice of trial given and countermanded, and the defendant was the ſame term ſurrendered in diſcharge of his bail. He lay by all *Eaſter* and *Trinity* term, and in the vacation made his eſcape, upon which the beginning of this term an eſcape warrant iſſued againſt him, which *Short* now moved to ſuperſede, becauſe the plaintiff having ſlept three terms, the defendant was entitled to be diſcharged upon common bail.

This

This was oppoſed, becauſe he had been guilty of an eſcape, and therefore entitled to no favour, but he ought to lie till he has tried it by proviſo.

*Per curiam*:—He is not indeed proper to pray a favour, but it would be hard he ſhould lie by till you think fit to try the cauſe; for it is not to be ſuppoſed one who cannot find bail ſhould be able to bring it on by proviſo. And beſides, as ſoon as he is taken upon the eſcape warrant, he will be entitled to his diſcharge by the rules of the court; ſo that to prevent the multiplying vexation and expence, we think proper to ſuperſede the warrant. *Stra* 401.

*Per curiam*:—If a man eſcapes, and returns again, and after commits a ſecond eſcape, he cannot be taken up for the firſt eſcape, it being purged by his return. *Stra.* 423.

On motion to diſcharge the defendant out of the cuſtody of the marſhal, the plaintiff in the action having ſent an order for his diſcharge.

Upon a rule to ſhew cauſe, the marſhal inſiſted, that the defendant had broke the priſon, and let out himſelf and another priſoner, who was in execution for 500 *l.* and that though the plaintiff's diſcharge came whilſt he was out of priſon, yet he had ſince retaken him for his fees, and had charged him in cuſtody with a declaration for the eſcape of the other. But there being no caſe to warrant the gaoler retaking for fees, and the plaintiff in the action being ſatisfied, the court held the retaking to be illegal, and conſequently the delivery of the declaration to him was void, and the marſhal ought to diſcharge him. 2 *Stra.* 909. 2 *Barnard K. B.* 20.

On a rule obtained, that a perſon taken on an eſcape warrant, and committed to *Newgate*, might be re-delivered to the marſhal in execution, upon account of his having eſcaped upon a day rule. But now motion was made, that that rule might be diſcharged upon an affidavit, that he was not out upon a day rule when he did eſcape; and accordingly the court granted the motion. *Barnard. K. B.* 437.

It is made a queſtion, whether an executor ſhall have an action on the caſe againſt the ſheriff, for an eſcape in the time of the teſtator on meſne proceſs? But the better opinion ſeems to be, the executor cannot have any remedy; the eſcape being in the time of the teſtator, it is a perſonal wrong to the party, & *moritur cum perſona*. 12 Mod. 71, 72. 11 Vin. Abr. 123. pl. 2. Poph. 189. Lat. 167. Jo. 173. pl. 8. Noy 87. Salk. 12. pl. 2. Comb. 322.

But on the other ſide it was ſaid by *Dodderidge*, the executor ſhall have this action, and that it is within the equity of the ſtatute 4 *Ed.*

3. for it is a wrong, though upon meſne proceſs, and the *tort* continues as to the executor; for every thing which makes to the hindrance of the execution of a will, is a wrong to him, and the performance of wills is much favoured in law. And if this action would not lie, it would be a miſchievous caſe; for as ſoon as the creditor dies, the gaoler may ſuffer the priſoner to eſcape, becauſe none may have action againſt him.

Two judges were againſt two.

*Whitlock*'s diverſity was, This perſonal *tort* may be conſidered in two reſpects; as a crime puniſhable, and that is gone; or as a *tort* to the party, and then it is but reaſonable that the executor ſhould have remedy.

But it is agreed by all, according to *F. N. B.* 121. A. that if it were upon eſcape after judgment, that the action would lie by the executor; therefore *quære* as to 2 *Keb. Rep.* 616. *pl.* 64.

The executor moved for a *ſcire facias* againſt the defendant eſcaped out of execution in the time of the teſtator, and that the *committitur* then entered may be vacated.

*Per cur'*:—Albeit the party or the gaoler on negligent eſcape, or the party on wilful eſcape, may take him again, yet not by a new proceſs or *capias* after a *committitur*; nor can the executors have any remedy.

The adminiſtrator may have action of *debt* againſt the ſheriff for the eſcape of a priſoner, ſuffered in the time of the inteſtate. But this was in the caſe of execution. *Styl.* 32.

So that the difference ſeems to be where the eſcape is on mean proceſs, and where it is on an execution.

Another difference is betwixt an eſcape in the life of the teſtator, and an eſcape in the time of the executor upon execution in the time of the teſtator. And it is agreed for law, that if a priſoner eſcapes in the time of the executor, the executor may have action of *debt*.

The action ought to be on the *detinue* only, for it is grounded on the former judgment. And as an action of *debt* on the firſt judgment ſhall be in the *detinet*, ſo here; and the difference was taken, where the action is grounded upon privity of contract, it ought to be in the *detinet*. *Aliter* when grounded upon a *tort*. 2 Danv. Abr. 501. pl. 1. Cro. Jac. 545. pl. 5. Hob. 264.

So

The ſame caſe, *Hob.* 272. by the name of *Longcaſtel* and *Sidley*. If it were in the *debet* and *detinet*, the plaintiff ſhould recover for his own uſe.

So it is in *Sty. Rep.* 32. 2 *Rol. Rep.* 132.

So executor brings debt upon eſcape of one who was bail in the recognizance with, *&c.* to his teſtator, it muſt be in the *detinet*. Lane's Rep. 80.

In debt for eſcape, brought by the executor; if he be nonſuit he ſhall not pay coſts. *Rol. Rep.* 63.

The plaintiff brings action on the caſe as executor againſt the ſheriff (defendant) for eſcape, and had judgment given him *per nomen* of executor. This judgment paſſed by *non ſum informatus*. Error was brought, becauſe the firſt judgment was given for him as adminiſtrator; and this in an action on the eſcape, and the judgment on it was *per nomen* of executor.

*Dodderidge* put the caſe.

The adminiſtrator hath one in execution for debt, the ſheriff ſuffers him to eſcape; he brought his action of *debt* againſt the ſheriff for this eſcape, and recovers; and after all he finds a will by which he himſelf was made executor. The recovery ſhall now be good, and this money recovered againſt the ſheriff ſhall be aſſets in his hands, and no *audita querela* in this caſe lies againſt the ſheriff. And *Brook* of the ſame opinion.

*Haughton contra.* If the firſt executor dies inteſtate, his adminiſtrator ſhall not have an action of *debt* againſt the ſheriff for this eſcape; no more ſhall the executor here in the principal caſe have his action againſt the ſheriff for the eſcape of him that was in execution at the ſuit of an adminiſtrator. The executor here hath no privity to ſue execution upon this judgment, becauſe the *ſcire fac'* depends on the ſatisfaction, and to this he is not privy. The court being divided, it was compounded. 3 *Bulſt.* 112. *Cro. Jac.* 394. *pl.* 6. *Rol. Rep.* 276. *Godb.* 262. *pl.* 361.

An action on the caſe lies by commiſſioners of bankruptcy, for ſuffering one to eſcape who was committed by them, becauſe he refuſed to be examined. *Rol. Rep.* 47. *pl.* 16. *Mo.* 834. *pl.* 1123. 2 *Bulſtr.* 236. *Yelv.* 20. 2 *Stra.* 901.

If the under-ſheriff takes one in execution, and ſuffers him to eſcape; action of debt lies againſt the ſheriff himſelf.

The under-sheriff suffered a prisoner to escape, and the action was brought against the under-sheriff, for (saith the book) it may be the sheriff himself had not notice of the matter: (and I conceive it is no matter whether he had or not, he having security from his under-sheriff.) *Leon.* 146. *pl.* 203.

If the under-sheriff lets one go that is arrested upon a *latitat*, and returns *non est inventus*; no action lies against the under-sheriff: but the sheriff shall not be imprisoned nor indicted for the act of the under-sheriff. *Latch.* 187.

*Cap' ad satisfaciend'* is awarded to the sheriff of *Berkshire* to arrest *J. S.* who was then in the custody of the mayor and burgesses of *Windsor*, and he awarded a warrant to the mayor, *&c.* to take him, who did so, and after let him escape. An action of debt for this escape lies against them, not against the sheriff.

And the like law of a bailiff of a franchise.

An action of debt is maintainable against a gaoler or sheriff for escape out of execution; but it doth not lie against his executors or administrators; see above, yet with this difference. *Dyer* 271, 322.

Where the sheriff is chargeable in his life-time for a personal *tort* or *misfeazance*, there his person is only chargeable, *&c. actio moritur cum persona*; but where he is chargeable for levying money on a *fieri fac'*, and not paying it over, there if he dies, his executors are chargeable: it is a duty. *Cro. Car.* 539. *pl.* 3.

A prisoner taken on mean process upon plaint before the sheriff in *London*, is in custody of a serjeant and escapes, the action shall be brought against the serjeant in this case. *Sid.* 318.

Action upon the case against the defendants being sheriff of *London*, on mesne process, and after issue and trial by *nisi prius*, and before the day *in banco*, one of them dies; though they are reputed one officer, yet thy are two distinct persons, and the suit shall proceed against the other. *Hardr.* 161.

*Note.* If the party negligently escape, the party and the sheriff may take him again; but if voluntarily, then only the party may take him again, but not the sheriff; but if the sheriff let him go by the consent of the plaintiff, then neither can take him. 2 *Keb. Rep.* 206. *pl.* 43.

But though the party or gaoler on negligent escape, or the party on wilful escape may take him again, yet not by a new process or *capias* after a *committitur*. 2 Keb. Rep. 616. pl. 64.

If

If one in execution on *ca. sa.* escape of his own wrong, yet the plaintiff cannot have other execution. *Hob.* 6.

If a man taken in execution by a *capias* be put in prison, and after escapes, and after the sheriff dies, a new *capias* lies against him, otherwise the plaintiff would be without remedy. But if a man be in prison, and the marshal die, and then the prisoner escapes, there is no remedy but to take him again; for if after the death of the old sheriff, and before another is made sheriff, a prisoner go at large, this is no escape, for he is in custody of the law, and may be retaken in execution at any time. *Hob.* 60. *Mod. Rep.* 14. 3 *Co.* 72.

On voluntary escape, the party doth not lose his interest, but may take him again; and if the sheriff die, he may make a new execution if he will.

So the plaintiff executor brought a *sci. fac.* on a judgment in debt for the testator against the defendant, *quare executionem habere non debet*; defendant pleads he was taken in execution *per ca. sa.* upon this judgment and committed to the *Fleet*, and that the warden permitted him *ire ad largum.* Plaintiff demurs, and judgment given *pro querente*; and he may have new execution against the defendant, who escapes out of prison; by three justices, *contra Vaughan.* 2 Jo. 21. Lev. 211. Sid. 330. pl. 12. Show. Rep. 177. 2 Mod. 136. Freem. 213. pl. 220.

Second point, whether *permisit ire ad larg.* shall be be implied *negligenter* or *voluntarie*, and it seems it is not voluntary, because the plea shall be most strongly taken against the pleader.

If *A.* be taken on execution at the suit of *B.* and *A.* voluntary escape by the assent of the sheriff, and after the sheriff retakes him and keeps him in prison, he shall be in execution to *B.* because though *B.* may bring an action against the sheriff on his voluntary escape, yet this is at his election; for the party in execution of his own wrong shall not put *B.* to his action against the sheriff against his will, and it may be that the sheriff is not able to make him recompence. *Sid.* 350.

So it is said, though the gaoler be liable to an action of trespass for the retaking, yet the prisoner is in execution; and the reason given is, the body is a pledge, and the execution must be effectual. 3 *Keb. Rep.* 453. *pl.* 22, 463. *pl.* 39.

Voluntary escape suffered only to gain fees, ought not to be countenanced, nor is no plea in bar, that the party was intended to return to prison again at his day; and the plaintiff has an interest, which is

is not discharged by the escape. But my Lord *Hobart*, on a trial at *Guildhall*, in the sheriff of *Essex*'s case, was of another opinion; the case was, The prisoner, having been in execution, was willingly let go out of prison by the gaoler, and then came into the gaol again, and so remained in the gaol till the time of another sheriff, and then escaped, and an action of debt was brought against the sheriff, and he directed the jury that the sheriff was not answerable to this action; for when he was suffered by the gaoler voluntarily to go abroad, the execution was utterly discharged, so as he could not lawfully be taken again, nor adjudged in execution by law, though the party would yield himself to it, or the creditor should allow it. 2 *Leon.* 162, 169.

If a prisoner in execution escape with the permission of the gaoler the execution is utterly gone and extinguished, and the plaintiff shall never resort to him that escapes, but shall hold himself to the gaoler for his remedy; *aliter* if he escapes voluntarily, or of his own wrong, *prout supra*, but the law is now held otherwise. But it is otherwise in case of a *rescous*. Hob. 202. 2 Leon. 117, 162.

In *scire fac'* to have execution on a judgment in debt, defendant pleads, that at another time the plaintiff had sued execution by *cap' ad satisfaciend'*, and the defendant was taken in execution. Plaintiff replies, that true it is, he sued a *capias ad satisfaciend'*, and the defendant was taken thereupon, but he presently rescued himself and escaped.

*Per cur'*:—The replication is good, and it is no reason the defendant should take advantage of his own wrong; though it is no good return upon a *capias ad satisfaciend'*, that the defendant rescued himself, nor any plea in debt on escape; and the plaintiff may have as well his remedy against the party as against the sheriff, and the party hath liberty to begin again *de novo* by action on the judgment, or against the sheriff. *Cro. Car.* 240. *pl.* 25.

If a man upon a *capias ad satisfaciend'* be taken in execution, and after rescues himself from the sheriff, and escapes, the plaintiff may have a new *capias* against him, and take him again; the first writ not being returned or filed, nor any record made of the award; and this on a *sci. fac'* after the year, because he shall not take advantage of his own wrong, and so he may have *elegit*, or any other writ: and so it is if the sheriff had returned the writ and *rescous*, the plaintiff may have a new *capias* against him. *Rol. Abr.* 904.

If one in execution escape, and the sheriff makes fresh *pursuit* after him, and takes him again, although it be a long time after, yet he

he ſhall be ſaid to be in execution again, becauſe he ſhall not take advantage of his own wrong. *Mo.* 660. *pl.* 902. *Cro. El.* 439. *pl.* 55. *Poph.* 41. 3 *Co.* 52. *a. b.* *Gouldſb.* 18. *pl.* 114.

Where one is taken lawfully in execution, and after diſcharged by writ of error, and after the judgment is affirmed, a new *capias* lies not againſt him, but execution ſhall be awarded againſt his ſureties, if he will not render himſelf. But if the execution is reverſed, becauſe he was never lawfully taken in execution, (as if he be taken after the year without any *ſci' fac'*), he may be retaken again. *Latth.* 292.

Rule. *Debt upon eſcape ought always to purſue the firſt action.* Therefore where the plaintiff as executor brought debt againſt the ſheriff of *L.* on eſcape of *E. B.* againſt whom he recovered a debt of 82 *l.* as adminiſtrator of *J. S.* reciting all the record in certain, it is erroneous; for the firſt recovery was as adminiſtrator of *J. S.* and the debt on eſcape is as executor of *J. S.* which cannot be, that one ſhould die inteſtate and have an executor. *Cro. Jac.* 394. *pl.* 6.

The plaintiff declares againſt the ſheriff of *Devon* for an eſcape at *Exeter*, which is a city and county of itſelf, and not part of the county of *Devon*, yet good after verdict; for it ſhall be intended the defendant had the cuſtody of his priſoner in *Exon*, either by *hab. corp.* or on *freſh purſuit*. Sid. 364.

The plaintiff declares, that the party was in cuſtody of both the ſheriffs of *London*, and the action is brought againſt one of them, the priſoner that eſcaped being in *Ludgate*, in the cuſtody of the defendant only, the declaration is good; for the priſoner was in cuſtody of both the ſheriffs, though he was in the cuſtody of the defendant; and it ſtands well enough with the record, and the words *exiſten' in cuſtod'* is a good averment that he was in cuſtody; and the words *ut præfertur* do not hurt the averment. *Sty.* 297.

*Rule.* If the party in his declaration doth ſhew he has no cauſe of action, in ſuch caſe, if the ſheriff, by force of *capias* to him directed, doth take the party in execution, and ſuffer him to eſcape, no action of debt lies againſt the ſheriff for this eſcape. But in *Dy.* 67. *a.* 2 *Bulſtr.* 62. 9.

In action on eſcape againſt the ſheriff or gaoler, they ſhall not take advantage of the inſufficiency of the count, but ſhall anſwer to the eſcape.

The ſame law is of an error in the record or diſcontinuance, becauſe they are ſtrangers to it, no more than a ſtranger ſhall falſify a recovery by matter dilatory. *Dy.* 67. *a.*

*Rule.* The declaration in escape ought to mention the first judgment, or the plaintiff ought to shew he had recovered on judgment. And it is not sufficient to say, *quod recuperasset.*

The case was, *quod cum* the plaintiff *recuperasset v.* J. S. *&c. prout patet per recordum*; and that upon this a *capias* issued out, and *J. S.* was taken by the defendant, and escaped. It is too general, for *non constat* by the declaration that any judgment was ever given against him, and then he was not well taken in execution. *Saund.* 38, 39. *Lev.* 191. *Sid.* 305. *pl.* 14. *Saund.* 34.

Though the sheriff be in contempt, if he let him escape, yet no debt ariseth, unless there were a judgment; and though it be said the sheriff took him in execution, and for debt, *unde convict' est*, yet this is but a recital of the writ.

Declaration in escape may be according to the writ, (*viz.* that he escaped out of the custody of the sheriff or bailiff.) This is in action on the case. *Sid.* 332.

In case, declaration was, that the sheriff (the defendant) had arrested *L.* at the suit of the plaintiff, by a *lat'* sued out of the court the 21st of *January*, and that by the escape the plaintiff had lost his debt of 119 *l.*

Upon *not guilty*, the jury find, that the writ was *teste* 28th of *Nov.* but *revera* sued out of court the 21st of *June*, and that *habeas corpus* was sued by the plaintiff returnable *mesne Paschæ*, with intention to declare then against the said *L.* But the defendant upon another writ of *habeas corpus*, without the assent or notice of the plaintiff, sued and returnable *tres Paschæ*, *duxit* the said *L. ad respond'* to the plaintiff in trespass, *ac etiam billæ* of 19 *l.* where the said *L.* was in custody of the defendant *ad respond'* the plaintiff *in billæ de* 119 *l.* and so the said *L.* was permitted to escape.

Moved in arrest of judgment, because the action is founded upon an arrest at the suit of the plaintiff, by virtue of another writ than the writ found by the jury; and the plaintiff might have declared otherwise, (*videl'*) that he had sued a *lat' teste* 28 *November.*

*Per cur* :—There is *veritas legis*, and *veritas facti*, and the declaration is according to the verity of the fact; and by necessity of law the *teste* of the writ ought to be in term, as so is the course. Judgment *pro quer'*. 2 Jo. 149.

Though it be not shewn that the prisoner did not appear at the day, for if he did not appear, then the plaintiff was at no loss; yet that

that is not error in the declaration, for though he did appear, yet the *port* is not purged. *Cro. Eliz.* 289. *pl.* 5.

Upon an action of escape upon mean process, defendant pleaded, that after the time of the supposed escape, *H.* by consent of the plaintiff, appeared at the day of the return of the writ, *prout per record' apparet.* Repl. *Nul tiel record* of the appearance of *H.* by which it might appear, that he appeared by consent of the plaintiff. Defendant demurred especially, for that he put a double matter in issue, *&c.* Lutw. 73.

It was insisted for the defendant, that the replication was ill, because the allegation of the appearance of the defendant was sufficient; and the allegation over, that it was with consent, *&c.* was immaterial, and that the plaintiff might have only traversed the record of the appearance.

But on the other side it was moved, that the bar was ill. *Hobart* 210. *Latch.* 149. *Jo.* 138. 2 *Rol. Rep.* 119. But by consent the parties amended.

A declaration is against a sheriff, that he suffered his prisoner to escape, and had returned *cepi corpus & paratum habeo*; whereas *revera*, he had not the body at the return of the writ. *Quære* if this declaration was for the false return, or for the escape, or for both.

To this declaration the defendant might have pleaded the statute of 23 *H.* 6. but he demurred generally, and so has lost the advantage of the statute, which is a private statute, and the defendant has confessed the escape by the demurrer. *Saund.* 154, 155.

So that if the escape be well alledged, the court will not countenance error in other *nonformalities.*

The declaration was, whereas he had brought a writ of debt against *M. W.* and recovered, and shews all the matter of escape, *&c.* and then it is (as usually in the *Common Bench*) *unde queritur quod cum* he brought a writ of debt against *M. W. &c.* and saith not the aforesaid *M. W.* so it may be a stranger, and therefore not good. *Cro. Jac.* 188. *pl.* 5.

Upon conference with the prothonotaries, it is the common course in actions on the case after recital of the writ, in the *unde queritur*, to begin *de novo*, and not to say, *prædict'*, *&c.* And *per curiam*:—Both courses are well enough.

On *non omittas*, *capias* and *eſcape*. The *capias* was of 50*l*. and to anſwer 5*l*. *Alano Lockhart*, prothonotary. And the judgment in debt on the eſcape by default is 50*l*. and this was aſſigned for error, for the judgment and *capias* was but of 50*l*. as to the party. But *non allocatur*; for upon the whole the judgment is right, and but an error in fact, which cannot be aſſigned on the eſcape. 2 *Keb. Rep.* 646. *pl.* 81. 2 *Saund.* 98.

In eſcape againſt the marſhal, the plaintiff declared, that whereas *J. S.* was indebted to him by bond, and thereupon arreſted by *latitat* and put in bail, and the plaintiff obtained a judgment; who thereupon, in diſcharge of his bail, did render himſelf to Sir *John Lenthall*, in execution, and afterwards Sir *John Lenthall* (the marſhal) ſuffered him to eſcape. To this it was excepted, that he rendered himſelf to the marſhal; whereas he ought to ſay, he rendered himſelf to the court, for it is the act of the court that turns him over to the *Marſhalſea*, and a judge can only take and diſcharge the bail. But it is ſaid here, that he rendered himſelf to Sir *John Lenthall* in court, which is well enough. *Sty.* 330.

The declaration was, that he was in execution of the old ſheriff, and delivered to the new ſheriff, and then committed to the marſhal by *habeas corpus*, and then ſuffered to eſcape. *Cro. Jac.* 587. *pl.* 11.

This exception was taken to the declaration, becauſe it was not ſhewed that the ancient ſheriffs delivered him in execution, with the cauſes of impriſonment, to the new ſheriffs; for otherwiſe it is an eſcape in them, and not in the marſhal; for it may be he was delivered *per indenturam debito modo confectam* for other cauſes, and this cauſe was not mentioned. And a declaration ought to be certain to every intent; and though it it be ſaid *virtute cujus* he was in execution under the new ſheriffs, yet that does not help it, for it is but the concluſion of the premiſes; and if the matter before does not ſhew he was in execution, that *prætextus cujus* will not ſerve.

In debt on eſcape. The original and *capias*, which was returnable *Craſt. Martin'* in *Michael'* 1658, was ſet forth, and that *Sydly in exit' ab officio* in *December*, after the return delivered him over to *C.* and it appears not that the priſoner was ever in the cuſtody of *Sydly*. But by *Windham*, he could not elſe be turned over; and it is expreſsly ſaid he was in cuſtody, and it may be, no writ was returned by the ſheriff; and though in law he cannot be in cuſtody till the return, yet that ſhall be now intended. Neither need it be ſaid, that the ſheriff was continued in his office above a year. *Keb. Rep.* 632. *pl.* 119.

One

One was outlawed by the plaintiff, and by *habeas corpus* he was delivered to the *Marſhalſea*, and eſcaped. Now the declaration may be for the party only, and it need not be an action on the caſe *tam quam*, though here is a contempt to the King. *Bridg. Rep.* 8.

The plaintiff in debt on *eſcape*, declares of a recovery on 13, outlawed 15, and that he was taken up by a *cap' utlegat'* 18 *Car.* 2. after the year, and doth not declare that he was in cuſtody, nor that he was even charged in execution at the ſuit of the party, by prayer on the firſt judgment, (in which caſe, though an action on the caſe will lie, yet not action of debt.)

And after verdict *pro quer'*, *Maynard* moved in arreſt of judgment, that this taking after the year, after the recovery and judgment on the outlawry, does not make the priſoner in execution at the ſuit of the party without prayer; becauſe it may be intended, that the party intended to have other execution than the body. And relied on 5 *Co.* 89. that until election made, he is not in at the ſuit of the party. *Sid.* 380. *pl.* 11. 2 *Keb. Rep.* 408. *pl.* 30.

But upon *Cro. El.* 850. *Shaw* and *Cutler*'s caſe, and 766. *Leighton* and *Garnon*'s caſe, the court inclined, that though the *capias* be after the year, yet debt lies againſt the ſheriff for the eſcape, without any prayer of the party entered on record; and that he which is taken upon a *cap' utlegat'* is in execution at the ſuit of the party, till the party diſclaim it. 5 *Co.* 89.

So action on eſcape on mean proceſs in inferior courts, by virtue whereof the defendants, as bailiffs, did duly arreſt him, and they ſet not forth any plaint.

*Per cur.*—This is but inducement, and cured by appearance, the *eſcape* being well ſet forth. 2 *Keb. Rep.* 209. *pl.* 11.

In action on the caſe for eſcape, it was alledged in the declaration, that the ſheriff directed his warrant to the bailiff of a franchiſe to arreſt the party, who arreſted him, and delivered him to the under-ſheriff *in ea parte authorizat'*, *&c.* and ſhewed no place where the bailiff delivered the priſoner; for it may be, it was out of the county. *Sed non allocatur*; for the ſhewing the place was but inducement to the action; and when he pleaded *not guilty*, the *eſcape* is the matter material. *Cro. Eliz.* 289. *pl.* 5.

Debt upon eſcape was brought againſt the bailiff of a liberty, and it was excepted to the declaration, that it was not alledged the ſheriff made a warrant to the bailiff on execution, but only that *A.* afore-

aforeſaid, by virtue of the warrant aforeſaid, took the priſoner, and ſaith not within the liberty aforeſaid. *Sed non allocatur.*

Action on the caſe on *eſcape* brought, and the plaintiff declares, that the party was in execution at the ſuit of the teſtator; it is good without ſaying, *profert in curia* of the will. *Rol. Rep.* 78.

*Baron* and *feme* brought *eſcape*; the *baron* arreſts the priſoner with a *latitat* in his own name ſole. And now he declares, that he took out the *latitat ea in intentione* to diſcharge the priſoner, upon a bond made to the wife *dum ſola fuit*; and by three juſtices, it is good.

Action on the caſe againſt a bailiff of a liberty on an *eſcape* by a clerk of the *Hanaper* in *Chancery*; and declares, that for recovery of his debt he proſecuted an attachment of *privilege*, directed to the ſheriff of *Middleſex*, *ad reſpond' placito tranſ. ea intentione*, that he ſhould put in bail for recovery of his debt on bond; the ſheriffs of *Middleſex* directed their warrant to the bailiff of *Weſtminſter*, and he arreſted him, and ſuffered him to eſcape. *Cro. Car.* 329.

The declaration is naught:

1. Becauſe he doth not ſay of what liberty he was bailiff, or whether he hath execution or return of writs.

2. He alledges he had an attachment of *privilege* to arreſt him in *treſpaſs*, intending after his appearance to declare in *debt*, which cannot be, unleſs in *B. R.*

And there the reaſon is, becauſe when he appears and puts in bail, he is ſuppoſed to be *in cuſtodia mareſcall'*, *&c.* and declares againſt him in cuſtody; but it is not ſo in any other court.

Upon a voluntary *eſcape*, the ſheriff ſhall not have an action on the caſe againſt the priſoner. *Aliter* upon a negligent *eſcape*. Mo. 597.

Sheriffs of *N.* bring action on the caſe and declare,

Whereas *J. S.* recovered againſt the defendant in debt of, *&c.* and a *cap' ad ſatisfaciend'* was awarded againſt him, by force whereof they directed their warrant to three ſerjeants, *&c.* to arreſt him, who did arreſt him 26 *Feb. &c.* and he eſcaped, and afterwards was not found in the ſame county, *per quod* by reaſon of the ſame *eſcape* they were bound to anſwer the debt *ad dampnum*, *&c.*

The jury on *not guilty*, found that he was arreſted about the 26th of *Febr.* and to this declaration it was excepted:

1. They

1. They alledged they made a certain warrant, and ſay not *ſub ſigillo ſigiliat'*, and a warrant without a ſeal is inſufficient. *Per cur.* —It is the uſual form, and they do not uſually ſay, *ſub ſigillo, &c.*

2. They ſay, they are chargeable with the debt, but ſay not that they were charged or damnified; and if they be not damnified, they have no cauſe of action: for perhaps the party will never ſue them, or they may die before ſuit, and then the ſuit is gone.

But *per cur.*—Action lies in the eſcape before they are ſued, for the party arreſted did a wrong to them by the *eſcape* and *reſcous*, and they are always chargeable to the other party; and if they ſtay till they are ſued, perhaps the party that eſcaped may die, or fly the country.

3. The arreſt and reſcue are ſuppoſed the 26th of *February*, which is uncertain whether it were before or after that day; and if it were after that day, it will not maintain the declaration, for then it cannot be a reſcue the 26th day.

*Per cur.*—The verdict is good before or after the day, ſo as it was before the ſuit commenced. *Cro. El.* 53. *pl.* 3.

If judgment be given in debt againſt the ſheriff on *eſcape*, he ſhall have an action on the caſe againſt the party that eſcapes, although the gaoler licenſeth him to eſcape, and he ſhall not plead this licenſe. *Mo.* 404. *pl.* 541.

The ſheriff of *London* brought action upon the caſe againſt *Pain*, becauſe that he, being in execution under their cuſtody at *Spicer*'s ſuit, made *eſcape, &c.* The defendant confeſſed all the matter, but further pleaded, that, after the eſcape, *Spicer* had acknowledged ſatisfaction, (being after the *eſcape*) upon record of the ſum recovered; demurrer.

*Per cur.*—The action is maintainable, though the plaintiff in the firſt action had acknowledged ſatisfaction, the payment after doth not take away the action, but mitigates the damage only; for the act of a third perſon ſhall not take away the action once veſted. *Leon.* 237. *pl.* 321.

*Fitz. N. B.* 130. *b.* It is ſaid there, the plaintiffs in this action ought to ſhew, that they had been impleaded by him who recovered; for they cannot have this action before they are ſued. *Qu.*

*Falſe*

## *False Imprisonment.*

IF a bailiff arrests one after the writ is returned, false imprisonment lies.

A precept to arrest from an illegal court will not save the officer from an action of *false imprsonment*. Hob. 61.

Trespass, *&c.* will not lie against the sheriff for executing process, though it were erroneous. *Hob.* 48.

One asks another if his name be *J. S.?* who said, yes; on which he arrests him by a warrant which he had to arrest *J. S.* yet *false imprisonment* lies. *Mo.* 457. *pl.* 629.

One had a *capias ad satisfaciendum* delivered to the sheriff, who made a warrant to his bailiff to do execution; afterwards a *supersedeas* was awarded and delivered by the sheriffs to the defendant, being his bailiff, who escaped, and the defendant retook him and detained him in execution. The second is *false imprisonment*, for though the first imprisonment was legal, he having taken him by virtue of a warrant made before the *supersedeas* awarded and delivered, he, not having notice of *supersedeas*, was excusable. But the detainment in prison was afterwards a wrong, for he being the sheriff's servant, and by intendment having time given him sufficient to take notice from his master, ought at his peril to take notice thereof. *Cro. El.* 918. *pl.* 10. *Mo.* 677. *pl.* 921.

An action of *false imprisonment* will not lie against a sheriff or gaoler for taking the body by virtue of a *capias ad satisfac'*, upon an erroneous judgment, for the execution is good till avoided by writ of error. 3 *Mod.* 325.

The liberty of a man is so tender in the eye of the law, that a small thing amounts to *false imprisonment*. As in a case tried at *York* assizes, one *Robert*'s case.

One in execution in the county of *Lancaster*, desired to be brought to the county of *York*, to speak to his friends, and, being there, endeavoured to make his escape; and the defendant commanded to stay him. He was held a principal imprisoner, as well as those that laid hands on him. The defendant pleaded *not guilty*. Otherwise had it been, had he pleaded specially, *(viz.)* that the prisoner was brought into another county at his own desire. But the jury honestly gave but two-pence damage. *Robert*'s case at *York* assizes.

If

If a man be in the hands of the under-ſheriff in execution for debt, and the debtee tells the ſheriff that the priſoner has ſatisfied him; if the ſheriff releaſes not the priſoner, it is falſe impriſonment to detain one after the plaintiff hath commanded the ſheriff to deliver him. *Cro. Jac.* 379. 3 *Bulſtr.* 96. *Rol. Rep.* 240. *pl.* 10.

*A.* is in execution at the ſuit of *B.* afterwards *B.* came to the ſheriff, and told him he had made and ſealed a releaſe of the debt to the plaintiff, and that therefore he ſhould deliver him out of execution. The ſheriff doth not ſo, but after keeps him ſtill in priſon. The plaintiff brings action of falſe impriſonment. It lies.

By *ſtat.* 1 *R.* 2. *c.* 12. One being in execution ſhall not be ſuffered to go out of priſon by mainpriſe, bail or baſton, without making gree to the parties, unleſs it be by writ or other commandment of the King; and the detaining him after this amounts in law to a new taking: for the reſtraining of his liberty, where he ought to waive it, is a caption in law. Here the ſheriff ought to take notice of the party-plaintiff, and at whoſe ſuit he is in cuſtody.

By *Coke*, detainer after this, by the ſpace of one hour, is falſe impriſonment: (a continuance of an incloſure is a new nuiſance.) If if he would have helped himſelf here, he ought to have ſet forth that he knew him not to be the plaintiff, who told him of the releaſe. 3 *Bulſtr.* 96, 97.

The caſe of 20 *H.* 7. 19. differs from this caſe, becauſe the debt of the King was ſatisfied. *Rol. Rep.* 240. *pl.* 10. *Cro. Jac.* 379.

The party who went with the ſheriff to ſhew to him where the goods were (in execution,) the judgment being ſet aſide afterwards, was a treſpaſſer *ab initio*; but that the ſheriff was not ſuable nor chargeable. 2 *Sid.* 125. See 1 *Sid.* 272. *Lev.* 95. *T. Raym.* 73.

If one be arreſted by proceſs out of an inferior court, for a cauſe of action which does not ariſe within their juriſdiction, the party-plaintiff may well maintain his action againſt him that levied the plaint, or the officer who had executed it. 2 *Jo.* 214. 2 *Show. Rep.* 148. *pl.* 131. 204. *pl.* 214. *Lutw.* 1568. *Skin.* 49. *T. Raym.* 421, 467.

If a ſheriff juſtify by force of a *capias* to him directed, he ſhall ſay he was ſheriff at the time of the arreſt, as well as at the receipt of the writ. 35 *H.* 6. 48, 49.

In treſpaſs, where one juſtifies as an officer to do execution, *de ſon tort demeſne*, without anſwering to the cauſe, is no plea. 19 *H.* 6. 7. *a.*

In falſe impriſonment, the defendant may ſhew twenty cauſes by way of juſtification, and it is not double. 7 *Ed.* 4. 20. *Plowd. Com.* 86. *a.*

Where the ſheriff juſtifies by execution, he muſt plead that he returned the writ; *ſecus* of a bailiff. *Leon.* 144. *pl.* 20. *Cro. Eliz.* 181. *pl.* 16.

If a bailiff juſtify by force of a warrant, he need not ſay, *hic in cur' prolat'*, for the warrant doth not continue in his hands, but he returns it to the ſheriff. *Rol. Rep.* 327.

Though the proceedings in a court be irregular, yet if the court has power to iſſue out a *capias*, by this warrant the officer may juſtify in falſe impriſonment. *Mod. Rep.* 173.

If a bailiff juſtify by reaſon of a warrant, he ought to ſhew the place where the warrant was made. It ſufficeth if it be ſhewed in the rejoinder. 5 *H.* 7. 24. *Long* 5. *to* 101. *b.*

The ſheriff ought to return his writ, otherwiſe juſtification is not good; but it is ſo with the ſervant.

Falſe impriſonment was brought againſt the ſheriff's bailiff; he juſtifies by the ſheriff's warrant or *latitat*, who arreſted the plaintiff, and required the defendant to be aiding to him; but pleads not that the writ being returned, was executed. Yet *per cur.*—It is good, for the defendant has no means to reinforce the ſheriff to make return thereof. *Cro. Car.* 446. *pl.* 11.

In action of falſe impriſonment, the defendant juſtified by proceſs to the bailiff out of the court of the honour of *P.* and does not ſhew any proceſs was returned, which being an immediate officer, muſt be ſhewed. *Contra* of an under-officer. And although he need not ſhew forth the letters patents, yet it muſt be ſpecially pleaded ſuch a court was granted, and that *virtute, &c.* 2 Keb. Rep. 293. pl. 77.

If the defendant, in juſtification of an arreſt, pleads that a bill of *Middleſex* was proſecuted againſt the plaintiff, by which the ſheriff made and directed a warrant to arreſt him; it ſhall be intended that the bill was delivered to the ſheriff before the making of the warrant, till it be ſpecially ſhewn to the contrary. In this caſe he juſtifies by the writ to the ſheriff, and warrant to himſelf. *Saund.* 299.

The cauſes of demurrer were, becauſe it is not ſhewed the writ was delivered to the ſheriff, nor the warrant made before the arreſt; and alſo for that it is not averred that the writ was returned. But *non allocatur*: This is no eſſential matter, nor traverſable; and the plaintiff

plaintiff might have replied, that the arreſt was before the delivery of the writ, elſe the court will intend it to be delivered, being ſaid that *virtute* of a writ directed to the ſheriff, and warrant, the defendant arreſted; and the writ needs not be returned by a bailiff errant. 2 *Keb. Rep.* 607. *pl.* 41. 838. *pl.* 70. 844. *pl.* 81.

The ſame in *ſcire fac'* on recovery in action on the caſe; the defendant pleads, no *capias* iſſued out againſt *H.* delivered to the ſheriff. Plaintiff replies, a *capias* iſſued out, and *non eſt inventus* returned; but ſays nothing of the delivery to the ſheriff. Defendant demurs, and judgment *pro quer'*, for delivery to the ſheriff ſhall be intended. 3 *Keb. Rep.* 668. *pl.* 47.

*Note*; Upon a demurrer to a replication in aſſault and battery and a *faux impriſonment*, defendants juſtify by a precept to arreſt, *&c.* The principal exception to the plea was, that the juſtification of an arreſt by *molliter manus impoſuer'*, was not any juſtification of the battery; and the caſe of *Stoney* and *Calvert* was cited, *Hil.* 3 *W. & M.* which upon a demurrer was adjudged accordingly by the whole court. 2 *Lutw.* 929.

The time when a *latitat* iſſued forth is traverſable, and may be averred otherwiſe than according to the *teſte*; *per totam curiam*; for a relation ſhall not work a wrong. 2 *Keb. Rep.* 173. *pl.* 56. 198. *pl.* 25.

If a man be taken in vacation by a warrant without a writ, and a *latitat* be procured, *teſte* in the term, that *teſte* ſhall not diſcharge the wrong done after the *teſte*, and before the actual taking out of the writ; but the plaintiff may take iſſue that he proſecuted truly. But in treſpaſs and falſe impriſonment, the defendant, as ſheriff's bailiff, juſtified by a *latitat*, *teſte* 27 *June*, *Trin term* paſt.

The plaintiff replies, that the ſaid writ was really and actually proſecuted out of *B. R.* on the 9th of *Auguſt*, which was after the arreſt of the plaintiff.

Defendant demurs. And *per cur.*—This is an *eſtoppel* eſpecially in caſe of a bailiff, whoſe warrant might be before the arreſt; and all writs muſt be *teſte* as of the term, and the ſheriff's not returning the writ, or the not having any, ſhall not prejudice his under-bailiff.

*Per curiam*—A good action will lie againſt the ſheriff or bailiff of a franchiſe in this caſe.

In *Plunket* and *Green*'s caſe in the ſame reporter.

In treſpaſs and falſe impriſonment againſt the ſheriff and bailiff, the defendant juſtified by warrant and writ to the ſheriff, as *Long* and *Bolton*'s caſe. The plaintiff replies, no writ was then taken out. Defendant demurs, and judgment *pro quer'*; for though the bailiff hath a warrant, yet he is liable if there be no writ. *Contra*, if the writ be void and delivered. 2 *Keb. Rep.* 705. *pl.* 69.

*Treſpaſs and falſe impriſonment*, the defendant juſtifies by arreſt on *latitat*. Plaintiff replies, the writ was taken out after the arreſt. Defendant demurs. *Per cur.*—The antedate of the writ will not ſuffice, if the proceeding be after. And judgement *pro quer'*. 3 *Keb. Rep.* 213. *pl.* 21.

And as to pleading as to the time, *Richardſon* and *Pricket*'s caſe is to be obſerved. The plaintiff ſuppoſed the arreſt and impriſonment to be 10 *Decem.* 29 *Eliz.* Defendant pleads, by virtue of a warrant from the ſheriff he did arreſt and impriſon him the ſecond and third day of *December* before; *abſque hoc* that he was guilty before or after, *&c.*

Plaintiff replies, he was guilty of the treſpaſs, *&c.* after the third day of *December*, *prout in narratione ſua ſpecificatur*, and iſſue upon this, and well enough; though he ſaith, only he was guilty after the third day; but ſaith not, and before the action brought. For when it is ſaid, he was guilty after the third day, *&c. prout*, *&c.* it is to be intended to be the third day, and the day of which he counted. *Cro. Eliz.* 95. *pl.* 6.

To all the impriſonment, but eleven hours, the defendant pleads *not guilty*; and to the impriſonment for eleven hours he juſtifies as ſheriff, for that the plaintiff hindered him in the execution of his office, and ſaid nothing to the *Vi & armis*, yet good. *Saund.* 78.

This caſe went farther, 2 *Keb.* 237. The treſpaſs and falſe impriſonment was laid the firſt of *April*; the defendant juſtifies at another day at *Warw.* as ſheriff, *abſque hoc* that he was guilty the firſt of *April*, or at any time before or after, while he was ſheriff, or at any other place. *Per cur.*—This traverſe is ſufficient, and the plaintiff muſt reply and ſhew if there were any other aſſault or impriſonment. Alſo the traverſing the time before and after doth not lock up the plaintiff from aſſigning another day and place, eſpecially the thing being local. *Saund.* 78. 2 *Keb. Rep.* 237. *pl.* 13.

Juſtification in falſe impriſonment by a writ of *ſupplicavit de bono geſtu* out of *Chancery*, and arreſting him by the ſheriff's warrant thereupon. The juſtification being an act in the ſame county, and juſtifying all the time in the declaration, though it doth not agree with it

it in the day, but concludes, *quæ eſt eadem tranſgreſſio*, is good enough the day not being material; and the replication is not good, if it vary from the day in the declaration. *Cro. Car.* 228. *pl.* 6.

The caſe was, treſpaſs, *&c. ultimo die Octob.* 6 *Car.* and detaining him in priſon for two days. Defendant juſtifies, becauſe 13 *Aug.* 6 *Car.* a writ of *ſupplicavit* iſſued, and by warrant from the ſheriff to the defendant, he arreſted the plaintiff 21 *Sept.* and detained him two days, *&c. quæ eſt eadem tranſgreſſio, &c.*

In falſe impriſonment in *London* verſus *W.* defendant juſtifies in *Norfolk*, by force of a warrant to the ſheriff, *quæ eſt eadem tranſgreſſio, abſque hoc* that he is guilty in *London*. Plaintiff demurs generally.

1. Becauſe the plea is double; for the juſtification in *Norfolk*, *quæ eſt eadem tranſgreſſio*, had been ſufficient without more, and then the traverſe makes it double. But *per cur.*—You ſhall not take advantage of this upon a general demurrer. *Rol. Rep.* 221. *pl.* 26. *Cro. Jac.* 372. *pl.* 1.

2. He juſtifies by warrant, and ſays not, *hic in curia prolat'*. *Per cur.*—They need not ſhew this to be in court, for it appears to be executed, and that the warrant is returned to the ſheriff. And ſo for this laſt point is *Rol. Rep.* 327.

Treſpaſs in *London*. Defendant juſtifies by a warrant in the county of *N. quæ eſt eadem tranſgreſ. &c.* and traverſeth, that he is guilty in *London*, *vel alibi extra com' N.* and good. *Cro. Jac.* 372.

If the defendant in treſpaſs juſtify the ſame day and place, it is not neceſſary to ſay, *quæ eſt eadem, &c.* Bulſtr. 138. Keb. 27, 29.

Falſe impriſonment by a woman. The defendant ſaith, that ſhe was carried to *Southwark* by her conſent, which is the ſame impriſonment; and this is no plea, for impriſonment is againſt the will of one, and that is not ſo. 14 *H.* 6. 2.

So in aſſault, battery, and wounding; the defendant ſaith, that he laid his hands upon the plaintiff peaceably, and arreſted the plaintiff the ſame day, which is the ſame aſſault, battery, and wounding; and held it was no plea for the reaſon aforeſaid. 21. *H.* 7. 49.

Yet in falſe impriſonment, the defendant juſtifies as ſheriff, that he arreſted the plaintiff by a *capias*; and it is good, if he ſay, It is the ſame treſpaſs, otherwiſe not. 22 *E.* 4. *Bro. falſe impriſonment* 29.

In falſe impriſonment, the defendant juſtifies (as ſheriff) the taking the plaintiff by force of a *capias* directed to him at *D.* within his

county of *G.* where the plaintiff declares of an imprisonment in another county, there the traverse of the county is good; for the defendant cannot take the plaintiff, by force of the said process, in any other county than where he is sheriff: and so the justification is local. 3 *Leon.* 97. in *Partridge* and *Pool*'s case.

The defendant justifies the arrest *quousque* bond given to appear in *B. R. absque hoc* that at any time he did arrest without reasonable cause, until he gave such bond. Plaintiff demurs generally. *Per cur.*—The justification is good, and the plaintiff should have traversed, *absque hoc* that he was arrested, and detained till obligation to appear in *B. R.* 3 *Keb. Rep.* 165. *pl.* 42.

False imprisonment. Defendant justifies by arrest, by virtue of a warrant of the sheriff on a *latitat*. The plaintiff replies, *De injuria sua propria absque tali causa*. This is nought upon demurrer, being matter of record; but issue being taken upon it, and being in the affirmative, it is a *jeofail*, and good after verdict. Judgment *pro quer'*. Keb. Rep. 125. pl. 37. 164. pl. 115.

The defendant justified by a writ sued out of *B. R.* to *vic' Devon'*, and warrant and arrest thereupon, at *D. &c.* Replication, *De injuria, &c. absque tali causa*. Defendant demurred generally, and judgment for him; for it is ill, upon a general demurrer, to put the matter of record and fact, and variety of matters, in one issue, as the warrant, arrest, *&c.* 3 *Lev.* 65.

The defendant justifies in false imprisonment, because a writ of *vi laica removenda* came to the sheriff to remove the force. The plea need not say, they found him *resistentem in ea parte*.

Where the sheriff justifies by execution, he must plead, that he returned the writ; *secus* of a bailiff. *Leon.* 134. *pl.* 20.

In trover of 300 sheep, 1 *Dec.* 36. *El.* defendant pleads, that he was sheriff of *com' Lin'*, and that *J. S.* recovered against the plaintiff 100 *l.* and upon that a *fieri facias*, which writ was returnable *Crastin' Animar'*, 35 *El.* that this was delivered to him 1 *Oct.* 30 *Eliz.* that he on the 20th of *Oct.* took the said 300 sheep, and on the 22d of *Oct.* sold 104 sheep for 40 *l.* and that the other 196 sheep remained *pro defectu emptorum*; and at the same day of *Crastin' Animar'* he returned the said writ, and all this matter, the which is the same conversion, *absque hoc* that he converted them *aliter vel alio modo*. Per cur.—*The plea is insufficient.*

1. Because by his plea he doth not confess any conversion, and then the traverse is ill. He ought upon this matter to have pleaded *not guilty*, and given it in evidence.

2. Be-

2. Becauſe the declaration ſuppoſeth the trover and converſion to be the firſt of *December*, 36 *El.* and he juſtifies the converſion in *Oct.* 35. *El.* ſo he meets not with the plaintiff in time, and therefore he ought to have traverſed, and the traverſe *aliter vel alio modo* ſhall never anſwer to the time, but to the manner of the converſion.

3. He makes not any juſtification for four of the ſheep, but that he ſeized them; but he ſhews not what he did with them. *Cro. El.* 433.

In an action of battery, the defendant juſtifies by command of the bailiffs, to prevent reſcuing goods ſeized on execution.

Replication, *De injur' ſua propr'*, and traverſes the command of the bailiffs. Defendant demurs generally. Reſolved that the traverſe was ill, for he might do it of his own accord, to prevent a breach of the peace.

But it was alſo ſaid, that the defendant's plea was ill, becauſe the action being of a battery at *D.* and the juſtification at *S.* in the ſame county, and the bailiffs had authority through the whole county, and ſo the juſtification not local; and therefore he ought to have juſtified in the ſame place. And if the place had been material, he ought to have traverſed all other places within the ſaid county. Wherefore judgment was given for the plaintiff. See 3 *Lev.* 113.

Upon a juſtification (for an eſcape) by a *habeas corpus virtute cujus*, &c. The plaintiff in his replication traverſed the *virtute cujus*, and and the chief juſtice was of opinion, that the traverſe was ill, being as alledged of matter in law; but the other three juſtices were of a contrary opinion. The plaintiff had judgment. *Lutw.* 632.

Traverſe in replication, *De injuria ſua propr' abſque tali warranto. Et hoc pet' quod inquiratur per patriam.* Exception, that it ought to have been, *abſque hoc* that there was ſuch a warrant, and not as above; but the court inclined that it was good notwithſtanding. 2 *Lutw.* 1460, &c.

*Scire fac'* upon a judgment in debt. Defendant pleads a *fieri fac'* directed to the ſheriff of *L.* for levying the debt, and he by force of it took divers ſheep of the defendant's for the debt, and yet detains them. *Per cur.*—It is a good plea, although he do not alledge that the writ is returned; and although the writ is conditional, *ita quod habeas denarios*, &c. for the plaintiff hath remedy againſt the ſheriff, and the execution is lawful, which the defendant cannot reſiſt.

If

If in falſe impriſonment the defendant juſtifies by a *capias* of the ſheriff, and a warrant of the ſheriff to himſelf; there *De injuria ſua propria* generally is not a good plea, becauſe a matter of record is parcel of the cauſe. But there he ought to ſay, *De injuria ſua propria*, and traverſe the warrant, which is matter *en fait*.

*D.* brought action of aſſault, battery, and impriſonment of his wife, againſt *W.* and *W.* in *C. B.* defendants plead a ſpecial juſtification, *(viz.)* that in *Nov.* 2 *Jac.* action of treſpaſs was brought by *A.* againſt *Julian G.* and on general iſſue found for *Julian G.* and judgment for her; and afterwards, and before execution, *Julian G.* marries the plaintiff *D.* and afterwards writ of error was brought in *B. R.* and upon a *ſcire facias* againſt the ſaid *Julian*, judgment in *C. B.* was reverſed; and afterwards *ca. ſa.* was directed to *W.* and *W.* the ſheriff to take the ſaid *Julian G.* and they took her, with an averment, that the ſaid *Julian G.* and the wife of the now plaintiff, was one and the ſame perſon.

Plaintiff demurs, becauſe when the warrant is againſt *Julian G.* there is no ſuch *Julian G.* for by her marriage with the plaintiff ſhe had another name, and his averment cannot help him, becauſe it agrees not with his warrant. But *aliter*, had the variance been in the name of baptiſm only.

*Per cur.*—The *ſcire facias* was according to the judgment in the *C. B.* and well then might all the ſubſequent proceſs be ſo; but if the huſband had come upon the *ſcire facias*, and ſhewed how that ſhe was covert, then the action ought to be againſt both of them. And,

2. The parties themſelves, in all the proceedings throughout, have all admitted that ſhe is the ſame perſon, and had the ſame name, and they ſhall be concluded from ſaying the contrary. And though the ſheriff had ſhewed the marriage, this was but a bare allegation and ſuggeſtion of the ſheriff; and it appears not whether it were judicially ſo or not.

3. It would be dangerous for the ſheriff to return a *non eſt inventus*; for becauſe the parties have all admitted her name to be ſo in all proceedings, the ſheriff ſhall be eſtopped alſo, 3 *H.* 7. 10. and then action on the caſe would lie on the falſe return, if the woman ſhould be in the company of the ſheriff, and the party ſhew her to the ſheriff, and ſhe eſcape. *Brownl.* 226. 2 *Bulſtr.* 80.

In treſpaſs for taking goods, defendant pleads a recovery in the court of *Dorcheſter*, in debt againſt the plaintiff, and execution upon this by *fieri fac'*; and juſtifies the taking, appraiſing, and ſale (by conſent) of the plaintiff, in part of the ſatisfaction of the judgment recovered,

recovered, *quæ eſt eadem captio.* Plaintiff demurs, becauſe the defendant varying in the time of the taking from the time alledged in the declaration, he ought to traverſe any other taking; for the ſame goods may be taken at ſeveral times, and the *quæ eſt eadem captio* is not ſufficient; as 2 *Jo.* 146.

But *per cur.*—The averment ſufficeth. *Keil.* 27. *Bulſt.* 138. *Cro. Car.* 228.

Juſtification in treſpaſs, aſſault and battery, by proceſs out of an inferior court of record, is not good without ſhewing whether the court was holden by charter or preſcription. 2 *Jo.* 165.

In treſpaſs of battery, the defendant juſtifies by proceſs to arreſt one *W.* and the plaintiff would have reſcued him; whereupon he did *molliter manus imponere.*

The plaintiff replied, *De injuria ſua propria, abſque hoc* that the defendant had *virtute* of ſuch a warrant taken, as that by which the defendant juſtified. Defendant demurs.

*Per cur.*—The juſtification is ſufficient, and better by the admittance of the replication, and then if the iſſue had been joined *De injuria ſua propria* generally without ſuch traverſe. 2 *Keb. Rep.* 293. *pl.* 77.

In treſpaſs and impriſonment, the defendant juſtifies by a *capias*, and that the plaintiff did afterwards eſcape; and he, being bailiff, did follow him by virtue of the ſame warrant taken out upon the *capias.*

Plaintiff replies, he eſcaped by the licenſe of the ſheriff, and traverſeth the latter taking by virtue of the warrant.

*Per cur.*—The traverſe is idle, becauſe the plaintiff had ſufficiently confeſſed and avoided; and if he eſcaped by the ſheriff's licence, that ought to be the thing put in iſſue, and not the traverſe. *Brownl.* 197.

Upon a juſtification by a ſheriff's warrant, held the bar was ill, for that it was not ſhewn out of what court the *capias* iſſued; and for that the plaintiff had judgment. 2 *Lutw.* 1460, *&c.*

In treſpaſs againſt two for aſſault and battery, and menaces, *&c.* and breaking open the dwelling-houſe, *&c.* one of the defendants juſtifies by virtue of a writ *De homine replegiando W. L.* and a warrant delivered to the other from the ſheriff for that purpoſe, in whoſe aid

he entered, the door being open, and the plaintiff assaulted him; whereupon *molliter manus imposuit*, &c. the other defendant imparls.

Then the plaintiff prays oyer of the sheriff's warrants which appears to be directed to all his bailiffs, and then replies, *De injuria sua propria*, and traverses, that the first defendant entered by command of the other defendant; and the defendant rejoins, that he entered, &c. by command of the other, and then tenders issue thereon. And the plaintiff demurs specially. 2 *Lutw.* 1428, 1432.

Judgment was given for the plaintiff; and it seems chiefly for the defect of not averring, that *W. L.* that was to be replevied, was in the plaintiff's house at the time of the entry made, &c. and the reporter sets forth several cases to that purpose.

And as to an exception, that the writ *De homine replegiando* was conditional, as *Nisi captus fuit per speciale mandatum domini regis*, &c. The defendant, he says, ought also to have averred, that *W. L.* was not taken by any special mandate, &c.

And the reporter further adds, that being in some doubt as to this matter, he made what search he could, but found not in any book any justification by virtue *De homine replegiando*, or any authority concerning it.

Upon a justification by an attachment of goods, and demurrer, see *Lutw.* 1456, &c. that if a trespass be alledged the 10th of *November*, and the justification is the 11th, *quæ est eadem transgressio*, that the plea is good without any traverse.

That although the plea was sufficient in matter of substance, yet the addition of the traverse, that they are guilty *aliter vel alio modo*, (although mere surplusage) being specially shewn for causes of demurrer, had made it ill. *Mo.* 864. *Saund.* 312.

That an attachment of such a number of goods is not justifiable; and said, that one single thing alone might be attached; and by the Chief justice, that there ought to be a reasonable distress to make the defendant appear.

That it did not appear that the sheriffs, before whom the courts were held, had any authority to hold them; and for these reasons, judgment was for the plaintiff.

See the judges opinions, 2 *Vent.* 92. upon a special demurrer, that the traverse ought to have been omitted out of the defendant's plea, who justified in trespass, (for impounding plaintiffs cattle, *quousque finem*

*finem fecit* of 10*l.*) by virtue of a *fieri fac'* for 10*l.* debt, and 40*s.* for coſts, &c. upon the ſheriff's warrant, whereby he took the plaintiff's cattle in execution, and cauſed them to be appraiſed, and kept them in cuſtody until the plaintiff paid the execution money; and traverſes that he is guilty before or after.

By the Chief Juſtice and *R.* the juſtification ſhould have been till he paid the money to the uſe of the plaintiff, and not to the uſe of the ſheriff; and no authority in law to deliver goods back upon payment of part of the money; it ſeems the goods ought to have been ſold. *Cro. Jac.* 246. Judgment *pro quer'*.

## *Fees charged by the Sheriff and his Officers for executing Proceſs.*

AT *common law* no officer, whoſe office related to the adminiſtration of juſtice, could take any reward for doing his duty, but what he was to receive from the King. 2 *Bac. Abr.* 263. *Lil. Abr.* 808. 10 *Mod.* 139.

The fundamental maxim of the *common law* is confirmed by *ſtat.* 3 *Edw. c.* 26. whereby "No ſheriff ſhall take any reward to do his office, but ſhall be paid of that which he takes of the King; and that he who ſo doth ſhall yield thrice as much, and ſhall be puniſhed at the King's pleaſure."

And ſo much hath this law been thought to conduce to the honour of the King and welfare of the ſubject, that all preſcriptions whatſoever, which have been contrary to it, have been holden void. 2 *Bac. Abr.* 463.

The *common law* giving no fees to ſheriffs, made them backwards in executing writs, by reaſon of the great danger both in taking deſperate men, by reaſon of reſiſtance; and alſo in detaining them, for fear of eſcapes; ſo that they would have great rewards, or otherwiſe would do nothing: whereupon the parliament thought fit to ſtint their fees, as in 9 *Eliz. c.* 4. *per Dodderidge J. Latch.* 18. *Cro. Eliz.* 654. *pl.* 15.

A *promoter* of the King brought an action upon the above ſtatute of *Eliz.* againſt *J. B.* under-ſheriff, for taking twenty-pence over his fee, *contra formam ſtatuti*, of a priſoner in his ward, &c. The defendant ſaid, that he did not take it *contra formam ſtatuti*, &c. and gave in evidence, that he and all under-ſheriffs there, time out of mind, have uſed *to take of every priſoner for ſuſpicion of felony and acquitted*, which were in their ward, twenty-pence for a bar-fee, &c. And the plaintiff demurred upon the evidence, &c. and by the opinion

of all the juſtices, this is out of the caſe of the ſtatute, for the intent of the ſtatute is, where he ſo takes of them that be in ward, to eaſe them; but here, when he is acquitted, he is no priſoner: for if he eſcapes, the ſheriff ſhall not be charged of the eſcape, and this fee was aſſigned by the court for a bar-fee, by their diſcretion, *in conſideration of the great charge which the ſheriff has in keeping, bringing, and carrying back the priſoners, and in keeping a number of ſervants to carry them, and in attendance* for fear of eſcapes. And ſo the clear opinion of the juſtices was, that the twenty-pence for a bar-fee is out of the caſe of this ſtatute. *Bro. Abr.* tit. *Fees, pl.* 6. 21 *H.* 7. 16.

If a ſheriff *takes of a priſoner his clothes, or money out of his purſe in ſpite of his teeth*, it is out of the caſe of this ſtatute, becauſe *treſpaſs lies.* Bro. ibid. and tit. *Preſcription*, pl. 36. 21 H. 7. 15. S. C.

" It ſhall not be lawful for any ſheriff, under-ſheriff, bailiff of liberties, their officers, ſervants or deputies, by colour of their offices, to take for the ſerving of any extent or execution, upon the body, lands or goods, of any perſons, more than in this act is appointed, *viz.* twelve-pence for every twenty ſhillings where the ſum exceedeth not 100 *l.* and ſix-pence for every twenty ſhillings above 100 *l.* that he ſhall levy and deliver in execution, or take the body in execution for; upon pain that every ſheriff, *&c.* which ſhall do the contrary, ſhall forfeit to the party aggrieved his treble damage, and ſhall forfeit 40 *l.* the one moiety thereof to the Queen, and the other moiety to the party that will ſue for the ſame." *Stat.* 29 *Eliz. c.* 4. *ſect.* 1.

This ſtatute doth only extend to their executing of writs of execution in counties, and *not in cities*; and there they are allowed twelve-pence in the pound for the firſt hundred pounds, and ſix-pence in every hundred afterwards. But then they ought to pay their own bailiffs out of their poundage money for their pains. But of late, the ſheriffs of cities do demand the ſame as ſheriffs of counties have, and I have heard they have recovered it. *Lil. Abr.* 598.

" This act not to extend to any fees to be taken for any execution within any city or town corporate." 29 *El. c.* 4. *ſect.* 2.

It was reſolved that this proviſo extends to a city corporate, when *judgment* is there given within their *franchiſe*, and execution upon that and not when *judgment and execution iſſues out of ſuperior courts.* Cro. Car. 287. Latch 17, 52. Poph. 173.

In the firſt caſe, the officer is not at that great care and peril; but as to the ſheriff of a county, his travel and labour is all one, be it in the body of a county, or in a franchiſe: but if that *town be a county of itſelf*, there the ſheriffs ſhall have their fees according to

to this ſtatute. And now judgment was given for the plaintiff. *Noy* 76.

Becauſe he is at leſs trouble, the juriſdiction is narrow, and the ſheriff not ſo much in danger of an eſcape; but where in the principal caſe the juriſdiction being the palace court of the biſhop of *Rocheſter*, and as large as the dioceſe, and ſo was inſiſted not to be within the like reaſon. But *non allocatur*. 5 *Mod.* 97.

In an information on this ſtatute againſt the ſheriffs of *Glouceſter*, for taking above twelve-pence in the pound *for executing proceſs on a judgment in* C. P. the defendants *pleaded the proviſo* in the ſtatute, *wherein all cities and corporations, and their officers are excepted*, upon which it was demurred; for *Owen* ſerjeant moved, that this proviſo extended only for ſerving executions upon judgments in their courts, but not upon executions of judgments in other courts; and ſo it may be collected by the preamble and body of the act. But all the other *contra*, for it ſhall be expounded as well for ſerving executions upon judgments in other courts, as in their own courts. *Cro. El.* 263, 264.

And whereas it was objected, that the county *of the city of Glouceſter extends four or five miles* further than the city, and that this execution was not in the city, but within the county of the city, and ſo is not within the proviſo; the court ſaid, that if it had been ſo pleaded, peradventure it ſhould be otherwiſe; but as it is pleaded, it appears not to the court: and thereupon it was adjudged for the defendants. *Cro. Eliz.* 264. *Latch.* 19, 52. *S. P. per* 3 *J. S. C. Palm.* 399.

The ſheriff, by the equity of *ſtat.* 23 *H.* 6. *c.* 10. ſhall take four-pence for every warrant. *Winch.* 21.

There was much doubt upon the words of the ſtatute, and the court divided upon the point, whether the ſheriff ſhould not have twelve-pence in the pound for every pound to 100 *l.* and after that ſix-pence? or whether he ſhould have but ſix-pence for every pound when the execution is more than 100 *l.*? *Noy* 75, 76.

By 3 *Juſt.* againſt *Crew* Ch. J. the ſheriff ſhall have one ſhilling in the pound for the firſt 100 *l.* and ſix-pence for what is over 100 *l.*

*Poph.* 173. *S. C.* 176. cites a caſe where two juſtices *contra*, one held, that where the ſum exceeds 100 *l.* he ſhould have but ſix-pence for levying of every twenty ſhillings of the firſt 100 *l.* but that judgment was given upon other points, (but adds) that all the court ſeemed to be of opinion, that he ſhall have twelve-pence for every twenty ſhillings of the firſt 100 *l.* and ſix-pence for every twenty ſhillings

ſhillings of the reſidue. Held accordingly upon the firſt argument on a demurrer. *Sed quære quia adjurnatur.* Cro. Eliz. 335.

By *Hobart* and *Winch* J. the ſheriff ſhall have ſix-pence only, if the ſum exceeds 100 *l.* *Winch.* 51. *Latch.* 52. Accordingly adjudged and affirmed in error. *Cro. Car.* 286.

The author of the *Compleat Sheriff*, *p.* 479. makes the following *quære*, *viz.* When one ſheriff ſhall make the *extent*, and the other ſheriff the *liberate*, who ſhall have the fees given by the ſtatute?

In anſwer to which *quære*, I ſhall ſet forth an act of parliament, to which the above author has often referred his reader in the ſaid *Compleat Sheriff*.

" When any ſheriff ſhall, by proceſs out of the *Exchequer*, extend any goods, *&c.* into the hands of his Majeſty, *&c.* for any debts due to the crown, and ſhall die or be ſuperſeded before a *venditioni exponas* be awarded for ſale, or before he has made actual ſale thereof, and a writ ſhall afterwards be awarded to a ſubſequent ſheriff, who ſhall make ſale of ſuch goods, *&c.* the barons of the *Exchequer*, if ſitting, or if not ſitting, they or any of them, of the degree of the coif, ſhall ſettle the fees or poundage for ſuch ſeizure and ſale, between ſuch preceding and ſubſequent ſheriff, with regard to the trouble each ſheriff had in the execution of ſuch proceſs." *Stat.* 3 *Geo. c.* 15. *ſect.* 9.

*Note*; The fees ſhall be paid by him that ſets him to work, and not by the priſoner; of whom the bailiff on arreſt having taken ſeven ſhillings for attorney's fees, was convicted of extortion. *Keb. Rep.* 623. *pl.* ,

Poundage was allowed the ſheriff out of 100 *l.* (fine impoſed after conviction on indictment of battery in *K. B.*) levied upon a *fieri fac'*, and it was allowed out of the money in the hands of the clerk of the crown, paid by the ſheriff; though there was no precedent in *K. B.* for it. But the barons aways make ſuch allownce in the *Exchequer*, after the monies paid in there by the clerk of the crown. *Skin.* 12. *pl.* 13. 2 *Jo.* 185.

" No ſheriff, under-ſheriff, bailiff, or other perſon employed in levying any debts, *&c.* due to the crown by proceſs of the *Exchequer*, ſhall take any fee on pretence of ſuch levying, *&c.* except four-pence for an acquittance, which ſuch officer is to give to the perſon on whom ſuch debt, *&c.* is levied; and the bailiff, *&c.* receiving ſuch debt, *&c.* ſhall account for the ſame to the ſheriff, and may require an acquittance from ſuch ſheriff without fee; from which

debts the ſheriffs ſhall diſcharge the debtors by totting and anſwering the ſame on their accounts in the *Exchequer*; and if any ſheriff, *&c.* ſhall *nihil* or not duly anſwer to the crown any debt ſo levied, he ſhall forfeit treble damages to the party aggrieved, and double the ſum, which ſhall be decreed to the party aggrieved by the court of *Exchequer*, on complaint and proof of ſuch abuſe before the barons, in ſuch ſummary way as to them ſhall ſeem meet. And if any ſheriff, *&c.* ſhall demand any money from any perſon from whom any debt is payable to the crown by proceſs out of the *Exchequer*, on pretence of executing the proceſs, or in reſpect of fees due for collecting the ſame; or if any one of the officers aforeſaid ſhall demand any ſum for forbearing to levy any ſuch debts written out to them by the ſaid proceſs, every ſuch offender ſhall be adjudged guilty of extortion, injuſtice and oppreſſion; and being thereof convicted ſhall forfeit treble damages and coſts to the party aggrieved, and double the ſum extorted; to be decreed by the barons, on complaint and proof in a ſummary way; provided ſuch conviction be within two years after the offence." *Stat.* 3 *Geo. c.* 15. *ſect.* 13.

"Nothing in this act ſhall deprive any ſheriff of ſuch poundage or reward as may be given them by warrant from the Treaſury, Chancellor of the *Exchequer*, or the Barons, for any extraordinary ſervice to the crown." *Ibid. ſect.* 14.

"All ſheriffs who ſhall levy any debts, *&c.* except poſt fines due to his Majeſty by proceſs upon the ſummons of the pipe or green wax, by *levari facias* out of the *Exchequer*, ſhall have an allowance on their accounts of twelve-pence out of every twenty ſhillings, for any ſum not exceeding one hundred pounds, and ſix-pence for every twenty ſhillings above the firſt hundred pounds, and for all debts, *&c.* except poſt fines due to his Majeſty by proceſs and *fieri facias*, and extent, iſſuing out of the *Exchequer*, one ſhilling and ſix-pence out of every twenty ſhillings, for any ſum not exceeding one hundred pounds, and twelve-pence for every twenty ſhillings over and above the firſt hundred pounds; provided ſuch ſheriff ſhall anſwer the ſame on his account, by the general ſealing day of ſuch term in which he ought to be diſmiſſed the court, or in ſuch time to which he ſhall have a day granted to finiſh his accounts, by the Chief Baron, or one of the Barons of the Coif, and not otherwiſe." *Stat.* 3 *Geo.* 15. *ſect.* 3.

*Burrel* was outlawed at the ſuit of *Luſcomb* in a plea of debt in the *Common Pleas*, from whence a ſpecial *capias utlegatum* iſſued, and ſeveral lands of the defendant in the county of *Devon'* were ſeiſed.

The outlawry being tranſcribed into the *Exchequer*, a *levari* iſſued to the ſheriff, by virtue of which he levied the rents and profits to the value of 60 *l.*

The

The defendant obtained an order for ſix weeks time to plead, and to have reſtitution of the money upon giving ſecurity, which order was ſerved upon the ſheriff, and which he was willing to comply with, *deducting his poundage*, according to the above ſtatute.

Now upon a motion for an attachment againſt the ſheriff for not obeying the order, the queſtion was, whether he ſhould not retain his poundage, or ſhould be left to have it allowed in his accounts with the crown?

And the court ſeemed clearly of opinion he ſhould detain his poundage, and pay the reſidue only to the defendant, but would not abſolutely determine it in this method. *Bunb. Rep.* 305. *pl.* 388.

By *Glynn* Ch. J. There are no fees due to the ſheriff for executing an *habere facias poſſeſſionem*; and ſo let it be declared, although they have uſually taken fees for executing ſuch writs. *Lil. Abr.* 808.

It was reſolved, that the *ſtat.* 29 *Eliz. c.* 4. does *not extend to real executions*, but only to executions in perſonal actions; therefore it does not extend to an *habere facias ſeiſinam*, or *poſſeſſionem*. Salk. 331.

The ſheriffs took 200 *l.* to execute *hab' fac' poſſeſſionem*. Het. 52. Lit. Rep. 65. 2 Brownl. 283.

*Per cur.*—It is great oppreſſion to the ſubjects, that the ſheriffs (to whom the ſtatute had given ſo much in the pound, in caſe of execution againſt a perſonal eſtate) ſhould take ſuch fees in caſe of a real eſtate; and it was ſaid, it was not to be found that they have any legal fee upon this execution: but the uſual fee, which they ought to take, is 2 *s.* 4 *d.* 2 *Sid.* 155.

*Note*; A ſheriff was ordered to attend the court for demanding an exceſſive fee for the execution of an *hab' fac' poſſeſſ'*, the court ſaying there was none due. *Ventr.* 351.

"It ſhall not be lawful for any ſheriffs, or their bailiffs, or for the bailiffs of any liberty, by colour of their office, or by reaſon of their executing any writ of *habere facias poſſeſſionem*, or *ſeiſinam*, to receive any greater fee than twelve-pence for every twenty ſhillings of the yearly value of any lands, &c. whereof poſſeſſion or ſeiſin ſhall be given, where the whole exceeds not the yearly value of 100 *l.* and 6 *d.* for every twenty ſhillings *per ann.* above the yearly value of 100 *l.* *Stat.* 3 *Geo. c.* 15. *ſect.* 16. 8 *Geo. c.* 25. *ſect.* 5.

*Stat.* 29. *El. c.* 4. does not extend to executions upon *ſtatutes-merchant*, *recognizances*, &c. for the acts is to be underſtood of caſes

*where*

*where the judgment Redditur in invitum*, and not by the voluntary confeſſion of the party. *Salk.* 332.

In an action againſt a ſheriff for his fees, it was objected, that this was a *ca. ſa.* the which was not a ſatisfaction, and the ſtatute does not give any fee to the ſheriff, but only permits him to take a fee not exceeding ſuch a rate.

*Per cur.*—The uſage has always been ſince ſtatute of 28 *Eliz.* to take a fee upon a *ca. ſa.* and ſuch a fee is allowed to the ſheriff for his trouble which he had in the execution; and therefore, if there be a *ſecond execution*, he ought to have a fee for that alſo for his trouble, well as for the firſt. *Skin.* 363.

Upon a *capias ad ſatisfac'*, the ſheriff ſhall have his fees for the whole debt. *Salk.* 331.

*Powell* junior Juſtice ſaid, it was the opinion of *Holt* Ch. J. that the ſheriff ſhould have fees for executing an *elegit*; but he ſaid he doubted of that, becauſe it would be unreaſonable when the whole debt is 300*l.* and perhaps the land extended but 20*l. per ann.* that the ſheriff ſhould have fees for 500*l.*

*Treby* C. J. ſaid, that he ſhould have fees according to the ſum levied, and not according to the debt recovered, as upon a *fieri facias*. To which *Powel* J. anſwered, that that could not be, becauſe the party might detain the land till he was ſatisfied the entire debt; and the plaintiff is, by having made his election, barred of all other executions. *Salk.* 332.

"Poundage in no caſe ſhall be taken on executing any writ of *capias ad ſatisfaciendum*, or on charging any perſon in execution by virtue of ſuch writ, for any greater ſum than the real debt amounts to; which ſum the plaintiff is to mark on the back of the writ before it be delivered to the ſheriff; and if any ſheriff, *&c.* ſhall take greater fees, ſuch offender ſhall be adjudged guilty of extortion, injuſtice and oppreſſion; and, being convicted, ſhall forfeit to the party aggrieved treble damages, and double the ſum extorted; to be decreed by the court out of which ſuch writ iſſued, on complaint and proof of ſuch extortion before the court, in ſuch ſummary way as to them ſhall ſeem meet. And every perſon ſo offending ſhall forfeit 200*l.* one moiety to the King, and the other to ſuch as ſhall ſue in any court at *Weſtminſter*; provided ſuch ſuit be commenced within two years after the offence." *Stat.* 3 *Geo. c.* 15. *ſect.* 17.

It was held by the court, that the ſtatute extends to all judgments in *Weſtminſter*, and that, whether the ſheriff executes them in

a county or a franchiſe, he ſhall have his fees within this ſtatute, *viz.* one ſhilling in the pound for the firſt one hundred pounds, and ſix-pence a-pound for every other one hundred pounds. And ſo it is of the bailiff of a liberty, when he executes any execution on a judgment given in the courts at *Weſtminſter* within his liberty; but if the bailiff or other officer executes proceſs on a judgment given in a court of a *corporation or liberty*, he is not entitled to fees within this ſtatute. *Salk.* 331.

Upon a *hab' corp'*, the officer ought to bring the priſoner to the court, and his refuſal to bring him, unleſs paid his fees aforehand, is a contempt; for the King's writ muſt be obeyed, and the court will tax the charges, and compel payment, if the officer and priſoner cannot agree, or payment is not made according to the agreement. 2 *Jo.* 178. *March* 89. *Kel. Rep.* 280. But ſee *Keb. Rep.* 566. *contra.*

On a motion againſt *Bambridge*, the warden of the *Fleet*, it was held that if an *habeas corpus* is brought, he muſt obey it, though the party refuſes to pay his fees, for he has a remedy for them. 2 *Stra.* 814. *Keb. Rep.* 272. *pl.* 57.

The ſheriff had the defendant in execution on a *capias ad ſatisfaciendum*, and the plaintiff delivered him an *habeas corpus*, in order to remove him into the *King's Bench* priſon; the ſheriff upon this inſiſted to be paid his poundage on the execution, before he parted with the body of the defendant; And that there is nothing in the ſtatutes 29 *Eliz. c.* 4. or 3 *Geo. c.* 15. *ſect.* 17. againſt it; and offered, on payment of his poundage, to bring up the body. But the court ſaid, they could not be making bargains with people to obey their proceſs, which they would enforce an obedience to, and leave the ſheriff to his action of debt for the fees, which was his legal remedy. It went off at laſt, upon the ſheriff's ſubmitting to carry him to a judge's chambers.

*Foſter*, Juſtice, ſaid, If he was brought to him he would not turn him over till the poundage was paid. 2 *Stra.* 1262.

An under-ſheriff refuſed to execute a *capias ad ſatisfaciendum* till he had his fees; and upon motion againſt him, the court ſaid, that the plaintiff might bring an action againſt him for not doing his duty, or might pay him his fees, and *then indict him for extortion.* Salk. 330. pl.

It was moved that an under-ſheriff might attend for refuſing to execute a *fieri facias*, till his fee was paid. But the court would

would not grant the rule, but ſaid it was *extortion*, for which he might be *indicted*. Salk. 331. pl. 5.

In treſpaſs and falſe impriſonment, the defendant juſtified under an arreſt, by virtue of a warrant, *&c.* and that he detained the plaintiff, until he paid him one ſhilling and four-pence for fees. And judgment this term was given for the plaintiff, becauſe the defendant could not detain for his fees. *Lord. Raym.* 4.

A man was arraigned of two felonies, and paid but for one deliverance only. *Quod nota.* Bro. Abr. tit. *Fees*, pl. 8. cites 26 Aſſ. 47.

If, upon a ſtatute, *one ſheriff takes the body, and another the goods, per cur.*—Both ſhall have their fees. And whereſoever the ſheriff hath *double trouble*, he ſhall have *double fees*. Comb. 220.

He who renders himſelf, and has *ſuperſedeas before he is arreſted by capias* in debt, ſhall make an attorney in bank at the day, and this though a *cepi corpus* be returned, and ſhall pay no fees upon the ſpecial matter returned, *though he does not ſhew the ſuperſedeas to the ſheriff till after the taking*, if he renders himſelf to him before the taking. *Bro. Abr. tit.* Fees, *pl.* 4. *cites* 21 *H.* 6. 20.

If an erroneous writ be delivered to the ſheriff, and he executes it, he ſhall have fees, though the writ be erroneous. *Salk.* 332.

A writ of falſe judgment was delivered to the under-ſheriff, but no money was tendered or paid for the return; for want whereof the ſheriff took no notice of it, and executed a writ *De executione judicii.* Upon hearing council on both ſides, the ſheriff's proceeding was held to be regular. *Per cur.*—The defendant, if he thinks fit, may ſtill proceed upon his writ of falſe judgment. *Barnes* 135.

" No ſheriff, bailiff, or other officer, ſhall take any greater ſum for one or more night's lodging, or for a day's diet, or other expences of any perſon under arreſt in any proceſs, other than ſhall be allowed by ſome order already made, or which ſhall be made, by the juſtices of the peace at ſome general or quarter ſeſſions for the county, or place where ſuch arreſt ſhall be, who are with all convenient expedition to make ſome ſtanding orders for aſcertaining ſuch charges within their reſpective counties and juriſdictions, if the ſame hath not already been there made; and if any ſuch order hath been made, ſuch juſtices, at their general quarter ſeſſions, are to alter the ſame from time to time as they ſee occaſion, and are to cauſe a copy of every ſuch order, and of every alteration thereof ſigned by the clerk

of the peace, to be put and kept in ſome conſpicuous place in the ſeſſions-houſe, or ſome other proper place, of every ſuch county, &c. as ſuch juſtices ſhall order, ſo as the ſame may be there ſeen and examined as occaſion may require." Stat. 32 *Geo.* 2. *c.* 28. *ſect.* 2.

" The Lord Chief Juſtice of the *King's Bench*, The Lord Chief Juſtice of the *Common Pleas*, and the Lord Chief Baron of the *Exchequer*, or any two of them, with the mayor and two aldermen, or with three aldermen of *London* without the mayor, for the priſoners within the ſaid city; and the ſaid Lord Chief Juſtices and Lord Chief Baron, or any two of them, with three juſtices of peace of the counties of *Middleſex* and *Surry* reſpectively, for the priſons in the ſaid counties reſpectively, are required, with all convenient ſpeed, to meet from time to time at ſuch place as they think fit, and to ſettle a table of fees to be taken by any gaoler in *London*, or in *Middleſex* and *Surry*, where the ſame hath not been already eſtabliſhed; and where the ſame hath been eſtabliſhed, they are to meet and vary the ſame from time to time as they ſee occaſion; and the juſtices of the peace of every other county and place, for the priſons in each county, &c. are at any general or quarter ſeſſions of the peace, with all convenient ſpeed, to ſettle a table of the fees to be taken by any gaoler within their reſpective juriſdictions, where the ſame hath not been already ſettled; and where the ſame hath been ſettled, to alter the ſame from time to time, as there ſhall be occaſion. And the tables of ſuch fees ſo made or altered for the ſeveral priſons within the city of *London*, and counties of *Middleſex* and *Surry*, ſhall be ſigned by the ſaid Lords Chief Juſtices, and Lord Chief Baron, or two of them, and the mayor and two aldermen of *London*, or by three aldermen without the mayor, and by three juſtices of the peace of the counties of *Middleſex* and *Surry* reſpectively: and the table of ſuch fees made or altered for the reſt of the priſons, ſhall be ſigned by three or more juſtices of the peace, who make or alter the ſame at any general or quarter ſeſſions of the peace; and ſhall afterwards be confirmed, or moderated, within *England*, by the juſtiees of aſſize; and if within *Wales*, or the county palatine of *Cheſter*, by the juſtices of great ſeſſions reſpectively, at the next aſſizes, or great ſeſſions, in the reſpective counties within their ſeveral circuits next after the making or altering ſuch table of fees; and the ſame ſhall be afterwards ſigned by the reſpective judges of aſſize, or juſtices of great ſeſſions, who confirm or moderate the ſame, and three or more juſtices of peace of ſuch county, &c. for the priſons within their reſpective circuits, counties, or juriſdiction." *Ibid. ſect.* 5.

" No keeper of any priſon, or other perſon thereunto belonging, ſhall take directly or indirectly, of any priſoner for debt, damages, coſts,

coſts, or contempt, any greater fees for his commitment, chamberrent, or diſcharge, than ſhall be allowed in the table of fees inrolled and regiſtered as aforeſaid; and every ſheriff and other officer who ſhall offend againſt this act, ſhall for every ſuch offence (over and above ſuch penalties as he ſhall be liable unto by the laws now in force) forfeit to the party aggrieved 50 *l.* to be recovered, with treble coſts, by action of debt, *&c.* in any court of record at *Weſtminſter*, wherein no *eſſoign*, *&c.* ſhall be allowed." *Ibid. ſect.* 12.

The warden of the *Fleet*, and the warden of the palace of *Weſtminſter*, may take bond for diet and due fees of the office. *Hetly* 176.

The ſheriff may take a ſingle bill for his fees, and that is the ordinary courſe, but not with a penalty. To this purpoſe there is a notable caſe, *Winch* 20, 51. *Poph.* 176. 75. *Mo.* 853. *pl. Lat.* 20, 51. 10 *Mod.* 85, 86.

The condition of a bond to the ſheriff is to pay 20 *l.* that is, for money which is given to him for his fees, which are due by the ſtatute of 29 *Eliz.* Defendant pleads the ſtatute of 23 *H.* 6. *c.* 10. The caſe was, a ſtatute of 200 *l.* was acknowledged to the defendant by *T. S.* and this was extended by the plaintiff, being under-ſheriff, and it was agreed between *C. E.* brother to the plaintiff, and the under-ſheriff, before the *liberate* executed, that the defendant ſhould enter into the ſaid bond to the uſe of the plaintiff. Three points were reſolved by the court.

1. This bond is not within ſtatute 23 *H.* 6. for the party was not within the ward of the ſheriff; and ſo was *Beaufage*'s caſe.

2. Sheriff may not take his ſalary appointed by the ſtatute till a compleat execution, *i. e.* till the *liberate*; for the words of the ſtatute are in the negative, and do not eſtabliſh the fees, but only tolerate them. And by *Hobart*, if the *coniſee* ſue an extent, and then refuſe to ſue the *liberate*, to the intent to defraud the ſheriff of his fees, the ſheriff ſhall have his remedy by action on the caſe.

3. This obligation is void by the *common law*, and extortion. See *Plowd.* 65.

The ſheriff may take a bond with a great penalty for the appearance of the party, but not for his fees, by the 23 *H.* 6. *c.* 10. for ſtatute, as to fees, is not repealed by 29 *Eliz. c.* 4.

By *Holt* Chief Juſtice, an action will lie for a ſheriff's fee; for the laws permitting him to take it, makes it a duty. *Skin.* 363. *Comb.* 220.

Action of debt lies for a ſheriff upon the ſtatute of 29 *Eliz.* *c.* 4. for execution fees, although the ſtatute doth not ſay he ſhall have the fees, nor any action for them; but only ſaith, he ſhall not take, for any execution made, any conſideration or recompence, beſides what is therein mentioned, which it ſhall be lawful for him to take, *viz.* 12 *d.* for 20 *s.* where the ſum doth not exceed 100 *l.* *Rol. Abr.* 598. *Rol. Rep.* 404.

The ſheriff ſhall have action on the caſe, but not debt, upon *aſſumpſit*, to pay his fees due by the law of the realm, for executing an execution. *Moor* 699. But he ſhall have debt for his fees not prohibited by the ſtatute of 29 *Eliz.* *Moor* 667, 853.

An action of debt was brought by the ſheriff of *Cambridgeſhire*, upon the 29 *Eliz.* *c.* 4. for his fees for executing an *elegit*; and upon *nil debet* pleaded, there was a verdict for the plaintiff.

Mr. *Page* and Mr. ſerjeant *Cheſhyre* took ſeveral exceptions in arreſt of judgment. Firſt, that no fees were due for executing an *elegit* within the ſtatute, and conſequently that the action lay not; for the land extended may be of little value, and therefore it is unreaſonable that the ſheriff ſhould have poundage of the whole debt. And where the land lies in ſeveral counties, a man may pay more in fees than his debt. And the caſe of *Bridge* and *Cage*, 2 *Cro.* 103. was cited.

An *aſſumpſit*, in conſideration that the plaintiff would execute a writ of *elegit* for a friend of the defendant's, to pay, *&c.* and held, that no action would lie, though the money promiſed to be paid was no more than his fee come to. In anſwer to this exception, ſerjeant *Parker* cited the caſe of *Spring* v. *Eeds*, which was *intr. Hil.* 28 & 29 *Car.* 2. *C. B.* *Rot.* 1410. where in the very ſame action judgment was given for the plaintiff, and that judgment affirmed in the *King's Bench*, the record of which affirmance is *Hil.* 29 & 30 *Car.* 2. *B. R. Rot.* 386.

As to the objection, where the land ſhould happen to lie in ſeveral counties, there was nothing of that in the preſent caſe. The reaſon of the caſe in 2 *Cro.* he ſaid, was, becauſe in that time the judges held no action would lie upon the ſtatute; but that has been held otherwiſe ſince, 1 *Cro.* 286, 287. *Jones* 307. where actions are maintained by ſheriffs for fees for executing *capias ad ſatisfaciendum.*

*Holt* Chief Juſtice ſaid, there was no reaſon why the ſheriff ſhould not have fees, as well for executing an *elegit*, as an *extent* upon a ſtatute. Upon the writ of *elegit*, the ſheriff returns, that he has taken an inquiſition, and extended the defendant's land, and delivered it to the plaintiff. And there is a *liberate* in the body of the writ of

of *elegit*, otherwiſe in caſe of an extentu pon a ſtatute there muſt be a *liberate*; and in the caſe of an *elegit*, upon the return of the delivery, the plaintiff may enter: and he can do no more in caſe of a ſtatute after a *liberate* executed, for he muſt not enter by force. The return *liberari feci*, is a full execution of the writ of *elegit*, and by that the plaintiff becomes tenant by *elegit*, and may maintain an ejectment; and he may enter and aſſign his intereſt upon the land, and the aſſignment will be good. For the defendant's continuing in poſſeſſion after the return of the writ, turns the plaintiff's eſtate to a right, and therefore he muſt enter before he can aſſign it over.

*Powel* Juſtice ſaid, that the like caſe with this was adjudged in the *Common Pleas*, while he ſat there; that all the objections, that are here made to the action, were made there, and over-ruled; that the court there reſolved, that the ſtatute of *Eliz.* mentioning extents, that ſhould not be confined to extents upon ſtatutes only, but ſhould be carried to extents upon *elegits*, eſpecially when they were both equally liable to the ſame exceptions.

As to the objection how it ſhould be, when ſeveral *elegits* were to go into ſeveral counties, they ſaid, they would give their reſolution in that when it came in queſtion: and therefore he was of opinion, that the ſheriff ſhould have his fees for executing an *elegit*. The other two judges agreed.

The ſecond exception, and which was the only one that ſtuck with the court, was, that the plaintiff had laid in his declaration, that the inquiſition was taken *apud villam Cantabrigiæ prædictæ*; and there was no *Cambridge* mentioned before. And this objection was inforced two ways.

Firſt, there was no *venue* where this fact, which was ſo material, and the very ground and foundation of the action, was done.

Secondly, that it did not appear that this inquiſition was taken within the county of *Cambridge*, as it ought to do, to entitle the plaintiff to his action: for, as *Powell* Juſtice ſaid, there are more towns in *England* of that name beſides that where the univerſity is, and for aught appears, it might be one of them where this inquiſition was taken, and conſequently out of the county; and ſo the execution void, and conſequently the plaintiff has no cauſe of action.

After conſideration as to the firſt part of the objection, it was reſolved by *Holt* Chief Juſtice, (to which the others agreed) that this was helped after verdict by the ſtatute 17 *Car.* 2. *c.* 8. as no *venue*, the cauſe having been tried by a jury of the proper county. And he compared it to the caſe in *Lev.* 207. upon an iſſue joined in an action

action of covenant, whether J. S. had any title to *Shrob-walk* in the foreſt of *Wittlewood*, in the county of *Northampton?* The action was laid in *London*, and the *venire facias* was from *Shrob-walk*; and though it was agreed, that a walk in a foreſt was but a liberty, and no place from which a *venue* could ariſe, yet this want of a *venue* was aided by the 17 *Car.* 2. the iſſue having been tried by a jury of the county, where the matter in iſſue aroſe. As to the ſecond, it was anſwered by the counſel for the plaintiff, and reſolved by the court, that that was helped by the verdict, for the iſſue being upon *nil debet*, if the *elegit* had been executed out of *Cambridgeſhire*, it had been a void execution, and conſequently againſt the plaintiff, and the jury muſt have found for the defendant *quod nil debet*; and therefore, a verdict being now found for the plaintiff, it muſt be intended that *Cambridge* is the county of *Cambridge*; for it muſt be intended that a record was given in evidence of an inquiſition taken within the county of *Cambridge*. Judgment was given for the plaintiff. 2 *Ld. Raym.* 1212. *Salk.* 333.

The giving money to a ſheriff, to arreſt a man, is againſt law. *Rol. Rep.* 313.

It was held that a ſheriff cannot take money for fees upon delivery of warrants to his own bailiff, but muſt ſtay till the money is levied; but in caſe of ſpecial bailiffs, of plaintiff's own naming, the ſheriff may take his fees preſently. *Clayt.* 79. *Mo.* 468. *pl.* 669.

No fee is due to the ſheriff for executing a *cap' utlegat'*, either for warrant to execute it, or for the return of it. *Lit. Rep.* 65. 2 *Brownl.* 283.

If any bailiff, or other ſheriff's officer, ſhall take any thing of any perſon, to ſpare them from appearing at the aſſizes, ſeſſions of the peace, or the like, it is extortion. *Compl. Sher.* 483.

On rule to ſhew cauſe why an attachment ſhould not go againſt one *Clendon*, for extorting two guineas from the defendant, before he would allow him to be bailed, his counſel ſaid, that the defendant abſconded, and for that reaſon *Clendon* was forced to be made a ſpecial officer in the writ, and the fee for that is 10*s.* of the money. Beſides he was two days lying in watch for him, with a couple of followers; he thought 1*l.* 12*s.* little enough for that. The court ſaid, the fee of 10*s.* is certainly due, and the reſt of the money is moderate enough; but yet it ought not to have been demanded of the defendant, ſo granted the attachment. *Barnard K. B.* 107.

If the ſheriff, or any of his officers, ſhall take any money, or other reward, for the omitting any arreſt or attachment to be made, it is extor-

extortion; and the sheriff or officer so offending, shall forfeit for every such offence 10 *l.* to the King and informer. 23 *H.* 6. *c.* 10.

As to the punishment of sheriffs for extortion, it is either by *indictment*, *information*, *imprisonment*, or *commitment*.

As to *indictments*, what is good or not.

Indictment of extortion against a bailiff of an hundred, *quod colore officii* he took *extorsive money*, and shews not for what matter or cause. *Per cur.*—It is well enough, the officer being bailiff of an hundred, especially being after a verdict. But *quære* of this. *Keb.* 557. *pl.*

By 23 *H.* 6. *c.* 10. on extortion, treble damages are given to the party, and the justices of peace may assess them; but they ought first to enquire of the damages by the jury. Therefore in *Bumpstead*'s case, *Cro. Car.* 488. *pl.* indictment was against the sheriff for extortious fees, on two several indictments. They awarded to the one treble damages; that is, where he took of one 20 *s.* *extorsive*, they awarded to the party 3 *l.* and 4 *l.* to the King. And on the other, where it was found he took 8 *s.* 8 *d.* *extorsive*, they awarded he should pay to the party 26 *s.* 8 *d.* So a quadruple value, and 20 *s.* fine to the King. And it was adjudged error. *Causa qua supra.*

The indictment must be *contra formam statuti*, if they will proceed upon the statute of 23 *H.* 6. *id. ibid.* The court were doubtful, if this statute extends to extortion, unless taken upon arrest. And judgment was reversed.

The sheriff's bailiffs were indicted at the quarter sessions for extortion. *W. Jo.* 379.

It was said by *Holt* Chief Justice, at a trial at *Guildhall*, that if a man be indicted for taking extorsively 20 *s.* and there is but proof of 1 *s.* yet the defendant is guilty. And (by him) the extorsive agreement is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion. *Ld. Raym.* 149.

An informer, on conviction of a prisoner for extortion, or other penal law, may have the third part of the fine, according to the King's privy seal for that purpose. And he had so of 10 *l.* set on a bailiff for 3 *l.* taken for execution done to his person. *Keb.* 357. *pl.* 487. *pl.*

Information was brought against the keeper of the gaol, or prison of the castle of *Maidstone*, for extortion on the stat. 23 *H.* 8. and it

was found by ſpecial verdict that there is not any caſtle in *Maidſtone*, but a gaol, and the defendant was gaoler there. *Per cur.*—Judgment for the plaintiff. 2 Rol. Abr. 211.

The ſheriff was committed to the *Fleet*, for taking illegal fees. 2 *Brownl.* 283.

A ſerjeant of *London* was committed in execution for a fine in extorting fees on an arreſt, and a third part was allotted to the proſecutor; his wife petitioned the court to mitigate the fine, but they could not. 3 *Keb.* 328. *pl.*

The ſheriff of *Suffolk* was impriſoned for taking a *guinea*, there being only 2 *s.* due to him, and he returned two *guineas* to the plaintiff, being double of what he had taken, on the 3 *Ed.* 1. *c.* 26. and ſo he was diſcharged. 3 *Keb.* 714. *pl.*

In replevin, *the ſheriff preſcribed to have forty ſhillings per ann.* of *J. N.* and his anceſtors, *for holding of his turn at* D. *for the eaſe of the defendant and his tenants*, for which ſum he diſtrained. And *per cur.*—He cannot preſcribe, for he is an officer removable yearly, and therefore the taking of the ſaid ſum is *extortion*. Bro. tit. *Fees*, &c. pl. 18. 42 E. 3. 4. Bro. Abr. *tit.* Corone, pl. 103. S. C. per Shard. Bro. Abr. *tit.* Office and Off. pl. 31. S. C. S P. Bro. Abr. *tit.* Preſcription, pl. 9. 40 E. 3. 4.—But ſhould be 42 E. 3. 4.

If a ſheriff, *&c.* aſſumes for money given to ſerve certain proceſs, this is not a good conſideration, as being againſt law; for it is extortion in the ſheriff to take it, and unlawful for the other to give it. *Rol. Abr.* 16. 19 *Vin. Abr.* 445. *pl.* 3. *Ergo Cro. Eliz.* 654. is not law.

An executor ſues execution by *elegit*, and *B.* an eſtranger, as friend the executor, in conſideration that the ſheriff will execute the ſaid *elegit* preſently, and of ſix-pence paid him by the ſheriff, aſſumes to pay 60 *l.* to him; whereupon the ſheriff executes the writ.

This conſideration is againſt law, for the ſheriff ought to do his duty without reward; and this 60 *l.* is not any diſcharge of ſheriff's fees due by the ſtatute, being given by a ſtranger, and not expreſs for them. *Rol. Abr.* 16.

And though it was alledged, that this ſum promiſed him is no more that what the ſtatute of 29 *Eliz.* allows him to take for his fees, yet that helps not the caſe, for that ſtatute only excuſeth him for his taking fees, whereas the *common law* did not permit him to take any thing

thing for the executing writs. And the giving of ſix-pence is no ſufficient conſideration, being joined with the other that is unlawful. *Cro. Jac.* 103.

*A.* is outlawed at the ſuit of *B.* for debt, and *B.* aſſumes in conſideration that *C.* an eſtranger will arreſt *A.* upon a *cap. utlegat'*, that he will pay him 40 *s.* This is no good conſideration, although he ſhews in his declaration that he was after made a ſpecial bailiff to the ſheriff, to arreſt him by a warrant directed to him. This is extortion; and the ſheriff, by ſuch means, may extort great ſums for doing his office: and the bailiff is the officer of the ſheriff, and his ſervant. *Rol. Abr. ib. Jones* 65. *Latch.* 54.

But if a promiſe be made to a meer ſtranger to go to the ſheriff, and procure him to arreſt *J. S.* this is a good conſideration. So if one pray me to go with the ſheriff to aſſiſt him in making execution, and promiſeth me, *&c.* it is good.

It is the duty of the ſheriff of *Middleſex*, by himſelf and deputies, to attend all his Majeſty's courts, judges, juſtices, and commiſſioners within his county; and to execute all his writs and proceſſes by them and every of them directed to him; and alſo to hold his county courts, tourns and court leets within the ſame.

The ſheriffs of *Middleſex*, who are alſo ſheriffs of *London*, are nominated by the citizens thereof; and are, as ſheriffs of *London*, at much greater expence in paſſing through their office, than the ſheriff of any other county in *England*; and therefore oblige their under-ſheriff of *Middleſex*, out of the fees and profits ariſing from that office, to advance money from time to time to pay all rewards, payable by the ſaid ſheriff, for apprehending highwaymen and other malefactors, which are given by ſeveral acts of parliament, and to pay the wages of the juſtices of the peace attending at the ſeveral ſeſſions of the peace for the ſaid county of *Middleſex*, and to bear part of the expence at the entertainments at the ſeſſions of gaol-delivery held in the *Old Bailey*, *London*, forthe county of *Middleſex*; which, together with other charges incident to the ſaid office, amounts annually at leaſt to the ſum of 450 *l.* For the diſpatch of the buſineſs of the county, he keeps his office at *Furnival's Inn*, *Holborn*, wherein, beſides his own attendance, three clerks are daily employed, (*Sundays* and holidays excepted;) they have no ſalary nor wages but the allowance hereafter mentioned, out of the fees. And in conſideration of his giving ſecurity to the ſaid ſheriff, in the ſum of 12,000 *l.* to indemnify him from all damages and loſſes that may happen from the miſtake, omiſſion, or miſdemeanor of him, his deputies, clerks or bailiffs, the ſheriff hath granted to him all the lawful fees, profits and perquiſites belonging to the ſaid office; and in virtue thereof he

claims the ſeveral fees and ſums of money hereafter mentioned, which are all the fees belonging to the ſaid office, except what be claimed by the county clerk.

## *As to the Nature and Operation of Sheriff's Bonds.*

IF the under-ſheriff covenant with his high-ſheriff, to ſave him harmleſs from all fines and amercements for any eſcape; and covenants alſo, that he will not execute any writ of *execution* above the ſum of 20*l.* without warrant from the high-ſheriff: this laſt covenant is againſt law, and void; yet the other is good, (but a bond in ſuch caſe is void in all) for by the ſtatute of 27 *Eliz. c.* 12. the under-ſheriff takes oath to execute all proceſs. *Brownl.* 65. *Godb.* 212. 12 *Mod.* 468. *Hob.* 12. *pl.* 25. *Mo.* 856. *pl.* 175. *Noy* 51. *Cro. Eliz.* 440. *pl.* 1. *Hetl.* 157.

The keeper of *Ludgate* gives bond to the ſheriffs of *London*, that he ſhould ſafely keep the priſoners committed to his charge, and ſhould ſave the ſheriff harmleſs from all eſcapes. The bond is good. *Cro. Eliz.* 466, *pl.* 17.

But it is not forfeited by eſcape of one taken by a *capias utlegat'* in debt; becauſe the *capias utlegatum* was awarded the 25th of *Eliz.* and was returnable the 35th of *Eliz.* and ſo merely void. For every *capias* ought to be returnable the enſuing term; becauſe of the miſchief that otherwiſe might befall the priſoner to be kept always in priſon, and he might well let him at large. *Dy.* 175.

Though peradventure this arreſt, by force of this proceſs, is excuſable in falſe impriſonment by the ſheriff, yet clearly it is no lawful impriſonment; and as to the prejudice or benefit of a ſtranger, he ſhall never be ſaid to be a priſoner. 14 *H.* 8. 16. 11 *H.* 4. 36.

In *aebt* on bond to perform covenants; which was, that the defendant ſhould not let at large any priſoner arreſted, without the ſheriff's warrant. the plaintiff ſhews, the defendant had let ſuch a priſoner at large at *Weſtminſter*, *&c.* it is good without ſhewing the time and place of the arreſt. For the eſcape is the material part of the covenant, and the manner of the arreſt is not in queſtion; and whether he were legally taken or impriſoned, was not material, when he was ſuffered to go at large. *Sid.* 3.

The condition of the bond was: Whereas *S.* was ſheriff of *Surry* and made *T.* bailiff of the hundred of *B.* now if he ſhould execute his office, *&c.* and make true return of all writs directed to him, then, *&c.* defendant pleads on *oyer* particularly, performance to all.

Plaintiff

Plaintiff replies, proceſs was directed to him to levy iſſues on *J. S.* and that he made his warrant to *T.* to execute the ſame, which warrant he did not return.

On demurrer, judgment was againſt the plaintiff; becauſe he did not ſhew that the iſſues were to be levied in the hundred of *B.* for though the words are general, to make return of all warrants directed to him, yet it was to be underſtood of ſuch only as were to be executed in his own hundred, of which he was bailiff. *Al.* 10. 2 *Saund.* 414, 415.

In *debt* on a bond by under-ſheriff, to defray the expence of the high-ſheriff; and performance pleaded. Plaintiff replies, *J. S.* recovered his charges in carrying the priſoner from *Chelmsford* to *London*, not ſhewing it was done by *habeas corpus*. Defendant rejoins, this was by private agreement. Plaintiff demurs becauſe it was not concluded to the country. There muſt be a compulſion ſhewed by *habeas corpus* to the ſheriff of *Suſſex*, without which he cannot deliver him over to another ſheriff; and then there is an allowance upon the account in the *Exchequer*, in caſe of tranſporting, being ſigned by the judges. And the court gave leave to diſcontinue. 3 *Keb. Rep.* 448. *pl.* 9.

An under-ſheriff gave bond to high-ſheriff without condition, but intentionally for performance of covenants to ſave the high-ſheriff harmleſs from eſcapes, and to pay the high-ſheriff out of the profits of the office 400*l.* It was inſiſted for the plaintiff, that the bond was void by the ſtatute againſt farming the office. And for the defendant, that it was the plaintiff's own agreement to pay it out of the profits, and the under-ſheriff was but his ſubſtitute; for if the profits did not extend to 400 *l.* he was not to pay ſo much, but to be accountable; and if they amounted to more, the defendant had no power to call him to account for more than the 400*l.* only. Beſides the ſtatute was not penal, nor inflicted any forfeiture or other puniſhment on the ſheriff, if he had farmed the office. *Finch* Chan. was of opinion ſeemingly, that the 400 *l.* ought to be paid; but referred it to a trial at law in the next county whether he was to have the 400 *l.* or no. 2 *Chan. Caſ.* 48.

A bond made by the under-ſheriff to the ſheriff, for diſcharge of eſcapes, is good: for ſince he transfers his authority to him, it is reaſonable he ſhould take ſecurity of him to perform; and there is nothing intended againſt law, but rather to prevent than connive at eſcapes. *Brownl.* 65, 81.

The high ſheriff brought an action of covenant againſt the under-ſheriff, and alledged, he was ſheriff *anno* 1658. and that one *W.* was then

then taken, and ſuffered to eſcape out of his cuſtody; whereupon *J. S.* recovered againſt him, and therein it was alledged, that the plaintiff, 12 *Car.* 2. ſuffered him to eſcape out of his cuſtody; it is well enough; and any eſcape, though after the year, would be a breach of covenant. 2 *Keb. Rep.* 352. *pl.* 43.

The high-ſheriff brought an action againſt the under-ſheriff, who pleaded he ſaved the high-ſheriff harmleſs. Plaintiff demurred, and the plea adjudged ill; for he may ſave him harmleſs in many things, and yet the plaintiff may be damnified in ſome other; he ought to have pleaded *non damnificatus*. 4 Bac. Abr. 439. 19 Vin. Abr. 447. pl. 1.

## *As to how far the Sheriff officially interferes with Members of Parliament.*

AT the next county-court, after delivery of the King's writ to the ſheriff, for the electing of parliament men, proclamation ſhall be made by the ſheriff in full county, of the day and place of parliament, and all they who are preſent ſhall attend, and in full county proceed to the election of their knights for the ſame county; and after they are choſen, the names of the perſons choſen ſhall be written in an indenture under the ſeals of the electors, and tacked to the ſaid writ of parliament. *Stat.* 7 *H.* 4. *c.* 15.

On any return contrary to this ſtatute of 8 *H.* 6. *c.* 7. the ſheriff ſhall forfeit 100 *l.* to the King, and have one year's impriſonment; and ſhall forfeit another 100*l.* to the perſon choſen knight of the ſhire, and not duly returned. The chuſers muſt have 40 *s. per annum* freehold within the ſaid county.

The plaintiff brought an action againſt the defendant for a falſe return of a member of parliament, inſtead of the plaintiff who was duly elected; and for that no determination in parliament was alledged by the plaintiff, or found in the ſpecial verdict, judgment was given for the defendant. *Lutw.* 82.

On an action for a falſe return of a citizen to ſerve for the city of *Coventry*, ſeveral exceptions were taken after a verdict to the declaration.

Firſt, that the declaration mentions, that the writ iſſued out of *Chancery (recitando,) &c.* and after the recital, then it ſays *præcepit, &c.* and ſo there does not appear any nominative caſe to the word *præcepit*. *But not allowed*; for the King is before mentioned, and ſhall

ſhall be the nominative caſe to the verb *præcepit*; ſo in a *præcipe quod reddat*, *præcipe* A. *quod reddat* B. 10*l*. *quas ei debet et injuſte detinet ut dicit*; there is no nominative caſe, yet it is good *Latin*; and *A*. ſhall be the nominative caſe to the words *reddat* and *debet*, and *B*. is the nominative caſe to the word *dicit*; ſo in pleading, *et hoc paratus eſt verificare, unde petit judicium & dampna ſua, &c*. no nominative caſe appears to the words *paratus eſt & petit*.

Other exceptions were taken to the declaration, for that the plaintiff had ſet forth the proceeding of the ſheriff in his election, by which it appears that the ſheriff did not proceed regularly to an election, and therefore there was no election, and then no action can be for a falſe return. *But not allowed*; for the ſheriff ſhall not take advantage of his own irregular proceeding to excuſe himſelf from an action.

*Holt* Ch. J. It was ſufficient for the plaintiff in this caſe to have ſaid, that ſuch a writ iſſued, and was delivered to the ſheriff, upon which he proceeded to an election *ſecundum exigentiam brevis*, and that the plaintiff was *debito modo* elected. *Com. Rep.* 132.

The choice muſt be between 8 and 11 of the clock in the forenoon.

Every ſheriff, after receipt of the King's writ for electing knights of parliament, ought forthwith to make out his warrants under the ſeal of his office, to every mayor and bailiff of city and borough within the county; reciting in his ſaid warrants the writ of parliament, commanding them thereby to chuſe citizens and burgeſſes to come to the parliament; *(ſcil.)* if it be a city, to chuſe citizens for the ſame city by citizens; and if it be a borough, to chuſe burgeſſes by burgeſſes (or freeman of the ſame borough.) And mayors and bailiffs muſt make a lawful return of that precept to the ſheriff, by indentures made between them and their ſheriff of their election, and of their names which are elected, 23 *H*. 6. 15. and the ſheriff muſt ſet his hand and ſeal of office to one part of the indentures, and then deliver it to them to be kept; and to the other part the mayor, or citizens or burgeſſes muſt ſet their hands and ſeals, and deliver it as their deeds to the ſheriff, to be certified and returned by him with the writ of ſummons to the clerk of the crown; and all this under pain of 100*l*. to the King, and impriſonment for one year; and the party aggrieved (or other perſon in his default) ſhall recover another 100*l*. but they muſt commence their action within three months after the commencement of the parliament; or the mayor and bailiffs ſhall pay 40*l*. Dy. 113. pl. 118.

Action on the caſe lies againſt a ſheriff for returning other knights for the county than were elected; and it is againſt the ſtatute of 7 *H*.

4. for falſe return, and 23 *H.* 6. *c.* 15. gives debt in the caſe; and it is not in the negative, and ſo does not exclude from other remedy. 2 *Sid.* 168.

## *As to the Manner of Sheriffs paſſing their Accounts.*

BY *ſtat.* 3 *Geo. c.* 15. *ſect.* 1. The officers of the *Chancery* and *Exchequer*, the auditors and receivers of the crown revenue in *Wales*, and all other officers claiming any fee from ſheriffs or under-ſheriffs, for making out their patents, or the *Dedimus* for ſwearing them, and for entering their recognizance, or for writing out and return of their proceſs, or for their appoſals, or caſting out of court, or for paſſing their accounts, or for making their *quietus*, or for any other matter, may take the fees in the ſchedule in this act ſpecified, but ſhall not take any greater fee, on penalty of 5 *l.* and treble the ſum taken, with treble coſts to the party aggrieved; all which ſhall be awarded by the court of *Exchequer*, on complaint and proof thereof before the barons, in ſuch ſummary way as ſhall ſeem meet.

By *ſect.* 2. The commiſſioners of the Treaſury, the chancellor and chief baron of the *Exchequer*, and the other barons, or any two of them, ſhall at the requeſt of any ſheriff, or as often as they ſhall think fit, call before them the treaſurer's remembrancer, the clerk of the pipe, or their deputies, ſecondaries, and ſuch other officers as they ſhall think fit, and cauſe them to bring an account of all the rents and certainties written out yearly in proceſſes to the ſheriffs to levy for the crown; and may alter or eſtabliſh the ſums wherewith the ſheriff ſtands charged on the rolls of profers, to ſuch ſums as ſhall ſeem juſt; and orders ſhall be drawn up purſuant thereto, and entered on record in the offices of the King's remembrancer, the treaſurer's remembrancer, and the clerk of the pipe, before the laſt day of *Michaelmas* term then following; and the ſums ſo ſettled ſhall be the profers of each county, and the rolls of profers ſhall be made conformable thereto.

By *ſect.* 4. No ſheriff ſhall be obliged to charge in his accounts any money to be paid as rewards on the conviction of highwaymen, clippers, coiners or houſe-breakers, but may immediately apply for the ſame to the Treaſury: who, on a certificate of the conviction of any offender, for which ſuch reward ſhall be ordered to be paid by the ſheriffs (by virtue of the acts 4 & 5 *W.* & *M. c.* 8. 6 & 7 *W.* 3. *c.* 17. and 5 *Ann. c.* 31.) together with the acquittances of the parties entitled to receive the rewards, ſhall forthwith repay to ſuch ſheriffs the money ſo diſburſed without fee.

By

By *ſect.* 5. No ſheriff or under-ſheriff ſhall be attached for not being appoſed on any writ or proceſs, or for any neglect or contempt relating to his accounts, but by writ under ſeal of the court of *Exchequer*, or by warrant ſigned by one of the barons, and to be executed by the marſhal or his deputy; in which warrant the name of ſuch ſheriff or under-ſheriff ſhall be inſerted, and his offence ſpecified.

By *ſect.* 6. If any perſon, concerned in paſſing of ſheriff's accounts, ſhall retard any ſheriff, or by wilful neglect or abſence prevent any ſheriff from being appoſed or caſt out of court in due time, or after tender of his fees ſhall refuſe to inrol, ſign and deliver his *quietus* in due time, he ſhall make ſuch recompence to the party aggrieved as ſhall be decreed by the barons, on complaint to them made, in ſuch ſummary way as they ſhall think fit.

By *ſect.* 7. If any ſheriff in any county of *England* (except the counties palatine of *Cheſter*, *Durham*, and *Lancaſter*, and the ſeveral counties of *Wales*, which do not paſs their accounts before the clerk of the pipe) ſhall be in ſurpluſage on his account by reaſon of any diſburſements for the ſervice of the crown (other than the rewards of 40 *l.* for the apprehending highwaymen, *&c.*) he ſhall not be obliged to take out a record of ſurpluſage, but may apply to the Treaſury, who are required to pay the ſame, on the ſheriff's producing a certificate of ſuch ſurpluſage from the clerk of the pipe.

By *ſect.* 22. The ſheriffs of *Wales* ſhall not be compelled to appear to be appoſed in the *Exchequer*, but ſhall be appoſed before his Majeſty's auditor in *Wales*; and the *quietus* of the ſaid ſheriffs, under the auditor's hand, ſhall be a ſufficient diſcharge.

By *ſect.* 23. The auditors of *Cheſter*, *Lancaſter*, and *Durham*, ſhall ſtate the accounts of the ſheriffs of the ſaid counties, and appoſe them touching the execution of the King's proceſs; and the ſaid ſheriffs, on ſuch accounts, may ſue forth a *quietus eſt* from the ſaid auditors, according to ancient uſage.

By *ſect.* 24. The ſheriff of the city of *Cheſter* ſhall account as formerly before the mayor, touching all matters granted from the crown to the city by charters.

By *ſect.* 25. The ſheriffs of the city of *Cheſter*, as for all other matters not granted to the city, and for which the ſheriffs are accountable to his Majeſty, ſhall account for the ſame before, and be appoſed by, and obtain their *quietus eſt* from the auditor of the county of *Cheſter*, in the ſame manner as the ſheriffs of the county of *Cheſter*.

By *ſtat.* 3 *Geo. c.* 16. *ſect.* 1. The yearly ſum of 4000 *l.* ſhall be ſet apart in the *Exchequer* out of ſuch fund as by an act of this ſeſſion ſhall be charged with the ſame, (*viz.* out of the aggregate fund) for the uſes hereafter mentioned.

There ſhall be paid yearly out of the ſaid monies, on the *firſt* day of *Michaelmas* term, to the ſheriffs of the ſeveral counties after mentioned, the ſums herein expreſſed, to enable them to bear the expences of the letters patents for their offices and to paſs their accounts, and to obtain their *quietus*; the ſaid yearly ſums to be received without account or impreſt to be ſet upon them, and without paying any fees for the ſame, *viz.*

To the Sheriff of the County of

| | £. | s. |
|---|---|---|
| Bedford | 93 | 6 |
| Berks | 96 | 0 |
| Bucks | 96 | 0 |
| Cambridge and Huntington | 95 | 10 |
| Cheſter | 62 | 5 |
| Cornwall | 102 | 16 |
| Cumberland | 90 | 2 |
| Derby | 93 | 19 |
| Devon | 106 | 9 |
| Dorſet | 101 | 6 |
| Eſſex | 108 | 10 |
| Glouceſter | 98 | 10 |
| Hereford | 94 | 6 |
| Hertford | 93 | 0 |
| Kent | 108 | 10 |
| Lancaſter | 67 | 7 |
| Leiceſter | 94 | 6 |
| Lincoln | 101 | 3 |
| Middleſex | 119 | 3 |
| Monmouth | 89 | 3 |
| Norfolk | 101 | 15 |
| Northampton | 96 | 0 |
| Northumberland | 91 | 0 |
| Nottingham | 95 | 13 |
| Oxon | 97 | 7 |
| Rutland | 69 | 11 |
| Salop | 98 | 3 |
| Somerſet | 112 | 19 |
| Southampton | 101 | 3 |
| Stafford | 95 | 10 |

Suffolk

| | £. | s. |
|---|---|---|
| Suffolk | 102 | 12 |
| Surry | 90 | 2 |
| Suſſex | 90 | 5 |
| Warwick | 93 | 10 |
| Wilts | 104 | 10 |
| Worceſter | 98 | 3 |
| York | 150 | 0 |
| Angleſy | 30 | 0 |
| Brecon | 30 | 0 |
| Cardigan | 30 | 0 |
| Carmarthen | 30 | 0 |
| Carnarvon | 30 | 0 |
| Denbigh | 30 | 0 |
| Flint | 30 | 0 |
| Glamorgan | 30 | 0 |
| Merioneth | 30 | 0 |
| Montgomery | 30 | 0 |
| Pembroke | 30 | 0 |
| Radnor | 30 | 0 |
| Weſtmoreland | 40 | 6 |

# APPENDIX.

## Containing the Office and Duty of a *Coroner*, &c.

THE Office of *coroner* being in ſome caſes connected with that of *ſheriff*, it ſeems neceſſary to ſhew them in one point of view, in order to make this treatiſe compleat.

The coroner's name is derived from the *Latin*, *viz. à corond*, ſo called, becauſe he is an officer of the crown, and has conuzance of ſome pleas, which are called *placita coronæ*. 2 Inſt. 31.

The ancient Kings *Alfred*, &c. in their firſt conſtitutions ordained coroners in every county, and that they ſhould receive appeals of felony, and that all the next towns ſhould preſent to the coroners in the county the miſchances to the bodies of the people, and the names of the finders, &c. Horn's Mir. *p.* 7, 9.

This office in ancient time was of ſuch eſtimation that none could have it but a knight. *Britton*, *fol.* 3.

The number of coroners are not fixed; in moſt counties there are four, beſides ſeveral ſpecial coroners in divers liberties and privileged places.

The Lord Chief Juſtice of the *King's Bench* is the ſovereign coroner; and he may view a body, and record it wherever he is. 4 *Rep.* 57. *b.*

The Lord Mayor of *London* is a coroner of that city, but the Recorder pronounces the judgment upon outlawries there by cuſtom. 8 *Rep.* 56. *a.* *Co. Lit.* 288. *b.*

There are likewiſe coroners of the verge, which is a certain compaſs about the King's court, who is alſo called coroner of the King's houſe. *Crompton's Juriſd.* 102

Alſo

Alſo ſome corporations and colleges are licenſed by charter to appoint coroners within their own precincts. 4 *Inſt.* 271.

The coroner of the King's houſhold hath an exempt juriſdiction within the verge, and the coroner of the county cannot intermeddle within it; as the coroner of the King's houſe may not intermeddle within the county out of the verge. 2 *Hawk.* 45.

If a murder be committed within the verge, and the King removes before an inquiſition taken by the *coroner of the King's houſhold*, the coroner of the county and the coroner of the King's houſe ſhall enquire of the ſame. And if the ſame perſon be coroner of the county and of the King's houſe, an indictment of death before him as coroner both of the King's houſe and of the county is good. 4 *Rep.* 46. 3 *Inſt.* 134.

By *ſtat.* 33 *Hen.* 8. it is ordained, that all inquiſitions upon the view of perſons ſlain within any of the King's palaces or houſes, or any other houſe or houſes wherein his Majeſty ſhall happen to be abiding in his royal perſon, ſhall be taken by the coroner for the time being of the King's houſhold, without any other coroner to aſſiſt, by the oaths of twelve or more of the yeomen officers of the King's houſe

Of the death of a man, or other articles belonging to a coroner ariſing upon the *High Sea*, inquiſitions have been uſually taken by the coroners appointed by the King or his admiral, and here the coroners of the county have no juriſdiction. But of deaths of men happening upon arms of the ſea below the bridges within the bodies of the counties, as upon the *Thames* or *Severn*, *&c.* in ſhips there hovering, though the coroner of the admiralty has juriſdiction, yet it is not excluſive of the coroner of the county, who may enquire in any great river upon theſe articles, where a man may ſee from one ſide to the other. 8 *E.* 2. *Coron.* 399. Only the inquiſitions taken before the coroner of the admiralty are returned before the commiſſioners, upon the ſtatute of 28 *H.* 8. *c.* 15. The inquiſition before the coroner of the county is to be returned before the commiſſioners of gaol delivery for the county.

*How*

*How theſe Officers are elected, and their Qualifications.*

TO prevent men of ſmall value and little underſtanding to be choſen coroners, it is neceſſary a coroner have the following five qualities.

He ſhould be *probus homo.*

*Legalis homo.*

Of ſufficient underſtanding and knowledge.

Of good ability and power to execute his office according to his knowledge.

Diligent in executing his office.

The *common law* does not only require expert men to be coroners, but men of ſufficient ability and livelihood, for three purpoſes:

1. The law preſumes they will do their duty.

2. That they be able to anſwer to the King all ſuch fines and duties as belong to him.

3. That they execute their office without bribery. 2 *Co. Inſt.* 174.

They are always elected in full county by the freeholders, by force of the King's writ *de coronatore eligendo*, for that both King and county have a great intereſt and benefit in the due execution of their office. *Ibid.*

By *ſtat.* 28 *Edw.* 3. *cap.* 6. coroners ſhall be choſen in full county, of the moſt meet and lawful people, ſaving to the King and other lords, which ought to make coroners, their franchiſes.

By *ſtat.* 14 *Edw.* 3. *cap.* 8. *it is enacted*, That no coroner ſhall be choſen unleſs he have land in fee ſufficient in the ſame county.

By *ſtat.* of *Weſt.* 1. *c.* 10. it requires ſuch a coroner as can, will, and may attend to execute the ſaid office; and therefore if ſuch a coroner be elected and choſen as cannot or will not attend the execution of the ſame, he is to be removed and diſcharged from his office by writ, and the cauſe of his inſufficiency muſt be expreſt in

the writ, the form of which writ may be found in the *Regiſter of Writs, fo.* 177.

If a coroner of any county dies, or be diſcharged from his office, then that writ *de coronatore eligendo* lies, and that writ ſhall be awarded unto the ſheriff, that he in full county, by the freeholders of the county, chuſe another in his place, and to certify the election, and his name who is choſen, into the Chancery. *F. N. B. p.* 163. on the margin.

## *The Form of the Writ* de Coronatore eligendo.

GEORGE *the third, by the grace of God of* Great Britain, France, *and* Ireland, *King, defender of the faith,* &c. *To the ſheriff of* M. *greeting. Becauſe* A. B. *late one of our coroners in your county is dead as we are informed, We command you, that, if it is ſo, then in your full county by the aſſent of the ſame county, you cauſe in the place of the ſaid* A. B. *one other coroner to be choſen, who being ſworn according to cuſtom, may from thenceforth do and keep thoſe things which to the office of coroner belong to be exerciſed in the county aforeſaid; and that you cauſe ſuch one to be choſen, who may beſt know and be able to exerciſe the ſaid office, and make his name known to us.* Witneſs, *&c.*

*Note.* When a coroner is diſcharged of his office by the King's writ ſent unto him, thereupon ſhall iſſue another writ, directed unto the ſheriff to chuſe a new coroner, and that writ ſhall recite the cauſe of his diſcharge in the following words:

## *The King to the Sheriff of,* &c.

*London,* to wit. BECAUSE A. B. *gent. one of the coroners of our ſaid Sovereign Lord the King in the ſaid county, has divers other buſineſſes which he occupys himſelf in, and therefore has not leiſure, as we are well aſſured, to exerciſe the office of coroner as he ought to do, him from the ſaid office we have removed: And we command thee, that if it ſo be, then in thy full county, by the aſſent of the ſame, that thou cauſe another coroner to be choſen in the place of him the ſaid* A. B. *according to the form of the ſtatute ſet forth and provided.* Or thus:

*Becauſe from the teſtimony we have received, worthy of credit, that* C. D. *one of the coroners of our ſaid Sovereign Lord the King in the ſaid county, is ſo decayed and infirm, and broken with old age, that he is not able to execute his office, him therefore the ſaid* C. D. *we have thought fit from that office ſhall be removed, and we command,* &c. Or thus: *Becauſe* E. F. *one of the coroners, is ſtricken with the palſy,* &c. Or,

*Becauſe*

*Becauſe he dwelleth in the out-parts of the county, wherefore thoſe things which belong to the office of a coroner he cannot commodiouſly do.* Or, *becauſe he is choſen into the office of Sheriff*, or, *verderer of a foreſt*, &c. (as the caſe is.)

If a coroner be diſcharged by the King's writ from his office upon a falſe ſuggeſtion, then the party may come into *Chancery* and require a commiſſion to enquire of the ſaid falſe ſuggeſtion; and if it be found falſe, then the King may make a *ſuperſedeas* to the ſheriff not to remove him from his office; or, if he be removed, to ſuffer him to execute his office as he did before.

By *ſtat.* 25 *Geo.* 2. *c.* 29. *it is enacted*, That if any coroner, who is not appointed by virtue of an annual election or nomination, or whoſe office of coroner is not annexed to any other office, ſhall be lawfully convicted of extortion, or wilful neglect of his duty, or miſdemeanor in his office, it ſhall be lawful for the court before whom he ſhall be ſo convicted, to adjudge that he ſhall be amoved from his office; and thereupon if ſuch coroner ſhall have been elected by the freeholders of any county, a writ ſhall iſſue for the amoving him from his office, and electing another coroner in his ſtead, in ſuch manner as writs for the amoval or diſcharge of coroners, and for electing coroners in their ſtead, are in any caſes already directed by law. And if the coroners ſo convicted ſhall have been appointed by the Lord or Lords of any liberty or franchiſe, or in any other manner than by the election of the freeholders of any county, the Lord or Lords of ſuch county or franchiſe, or the perſon or perſons entitled to the nomination or appointment of any ſuch coroner, ſhall, upon notice of ſuch judgment of amoval, nominate and appoint another perſon to be coroner in his ſtead.

When a coroner is choſen, he ſhall remain in the office ſo long as he behaves himſelf well, and is capable of performing it; and is not changeable every year, as ſheriffs and eſcheators are. And being elected by the county, his office determines not by the death of the King. 2 *Inſt.* 175. *Dal.* 15. 1 *Leon.* 120.

*Note.* When he is choſen, the ſheriff of the ſame county, or his Under-ſheriff, muſt give him his oath as follows:

By *ſtat.* 13 *Will.* 3. *ch.* 6. *it is enacted*, That all and every perſon or perſons that ſhall bear any office or offices civil or military, ſhall take the oath of abjuration, which oath is ſettled by the two ſubſequent *ſtat.* 1 *Ann. c.* 22. and 4 *Ann c.* 8. and other ſtatutes ſince require all perſons in publick offices to receive the ſacrament and to take the oath of allegiance, &c.

## The Coroner's Oath for the due Execution of his Office.

YOU *ſhall ſwear, that you will well and truly ſerve our Sovereign Lord the King and his people, in the office of a coroner, as one of his Majeſty's coroners of this county of* B. *and therein you ſhall diligently and truly do all things appertaining to your ſaid office, according to the beſt of your knowledge and power, both for the King's profit, and the good of the inhabitants within the ſaid county, taking ſuch fees as you ought to take by the laws and ſtatutes of this realm, and not otherwiſe.*

So help you God.

The coroner's court is a court of record, but he cannot enquire of any other felony but the death of a man, and that *ſuper viſum corporis, i. e.* upon the ſight of the body.

If a coroner's inqueſt be quaſhed, he muſt make a new inqueſt *ſuper viſum corporis*; but if a *melius inquirendum* be granted on a *male ſe geſſit* of the coroner, the new inquiry muſt be before the ſheriff or commiſſioners, not *ſuper viſum corporis*, but upon affidavits; for none but the coroner can enquire *ſuper viſum corporis*, and he is not to be truſted again; but when an enquiry is quaſhed, it is as if no inquiſition had been taken. *Salk.* 190. *Carth.* 71. 3 *Mod.* 228.

He ſhall alſo enquire of the eſcape of the murderer, of treaſure trove, deodands, and the wrecks of the ſea. 4 *Inſt.* 271. *Stat.* 3 *Hen.* 7. *c.* 1.

He is a judicial officer, and therefore cannot make a deputy. And by the ſtatute *de officio coronatoris*, 4 *Ed.* 1. *c.* 2. he is enjoined *ſtatim accedere ad occiſos*, immediately to go to the ſlain, which implies he ought to ſee the dead body. And if he does not come, having notice of the death of any perſon, he may be fined and impriſoned.

So ſoon as he has information to take a view of the body of any perſon killed, or ſuddenly dead or wounded, he ſhall go to the place forthwith, and make out a precept or warrant to ſummon a jury to appear before him at a day and place certain, to enquire thereof, and the form of the precept or warrant may be thus:

To

*The Coroner's Precept or Warrant to ſummon a Jury.*

To the Bailiff, Conſtable and Tithingmen of the Hundred of *R.* in this behalf jointly and ſeverally, greeting.

Surry. THESE *are in the name of our Sovereign Lord the King, to will and require you, immediately on the receipt and ſight hereof, to ſummon and warn twenty-four ſufficient and able men to be and appear before me at* Chertſey *in the county of* Surry, *on the ſeventh day of this inſtant* July, *at the houſe of* A. B. *being known by the ſign of the* Black Bull *in the ſaid town, between the hours of two and four of the clock in the afternoon, then and there to enquire of, do and execute all ſuch things as on his Majeſty's behalf ſhall be lawfully given them in charge; whereof fail not, as you and every of you will anſwer the contrary at your peril. Given under my hand and ſeal the ſixth day of* May, *in the ſeventeenth year of his Majeſty's reign, and in the year* 1777. *By me* C. D. *one of the coroners of the county aforeſaid.*

If it be in a city or corporation, then the form of the warrant or precept is thus:

To the Sheriffs of the city of *York*, and to the Serjeants at mace attending the ſaid Sheriffs.

York. THESE *are to will and require you, and in the name of our Sovereign Lord the King,* &c. *ſtrictly to charge and command you, that you cauſe to come before me, one of the coroners of the city of* York *and county of the ſame city, at the houſe of* E. F. *known by the ſign of the* Bumper *in* Coney-ſtreet *in the ſaid city, between the hours of one and three of the clock in the afternoon, on this preſent firſt day of* May, *twenty-four good and lawful men of the ſaid city, then and there to enquire upon the view of the body of* G. H. *there lying dead, how and in what manner he came to his death; fail not herein as you will anſwer the contrary. Given under my hand and ſeal the firſt day of* May, *&c. By me* J. K. *one of the coroners of this city aforeſaid.*

When the coroner is come to the place his warrant appointed, he is to call the conſtable, *&c.* to make a return of the warrant, and when he has it, command one of the bailiffs or conſtables his precept was directed to, or ſome other for them, to make three proclamations, or *O Yes*, and call the jury after this manner:

*YOU good men that are returned to appear here this preſent time, to enquire for our Sovereign Lord the King,* &c. *anſwer to your names, as*

*you ſhall be called, every man at the firſt call, upon pain and peril that ſhall fall thereon.*

*Note.* If jury fail coming when ſummoned, to forfeit 40 *s.*

The jury appearing and having choſen their foreman, he is to be ſworn firſt, and after him the reſt of the jurors may be ſworn, three or four at once, till you have ſworn about fifteen which is a ſufficient number.

The Foreman's Oath may be thus:

YOU *ſhall diligently enquire and true preſentment make on the behalf of our Sovereign Lord the King,* &c. *how and in what manner* L. M. *here lying dead, came to his death; and of ſuch other matters relating to the ſame as ſhall be lawfully required of you, according to your evidence; and you ſhall deliver up to me, his Majeſty's coroner, a true verdict thereof.*

So help you God.

Oath of the reſt of the Jury.

SUCH *oath as* A. B. *the foreman of this inqueſt, for his part hath taken, you and every one of you ſhall well and truly obſerve and keep on your parts.*

So help you God.

The jury being all ſworn, command them to ſtand together, and hear their charge as follows:

*The Coroner's Charge to the Jury of what Things he and they are to enquire, is beſt deſcribed from the ſtatute as follows:*

A Coroner, if he be certified by the King's bailiffs, or other honeſt men of the country, firſt he ſhall go to the place where any be killed, or ſuddenly dead or wounded, and ſhall forthwith command four of the next towns, or five or ſix, to appear before him in ſuch a place, and when they are come thither, the coroner upon the oath of them, ſhall enquire, if they know where the perſon was killed, whether it were in any houſe, field, bed, tavern, or company, and who were there, who were culpable either of the act or force,

force, and who were preſent either men or women, and of what age ſoever they be, (if they can ſpeak, or have any diſcretion;) and how many ſoever be found culpable by inquiſition in any of the matters aforeſaid, they ſhall be taken and delivered to the ſheriff, and ſhall be committed to the gaol: and ſuch as are found, and not guilty, ſhall be attached until the coming of the juſtices, and their names ſhall be written in the coroner's rolls.

If any man happen to be killed, and is found in the fields or the woods, firſt it is to be enquired, whether he was killed in the ſame place or not; and if he were brought and laid there, they ſhall do ſo much as they can to follow their ſteps that brought the body thither, whether he were brought upon a horſe or cart. It ſhall be enqured alſo, if the dead perſon were known, or elſe a ſtranger, and where he lay the night before; and if any be found guilty of the murder, the coroner ſhall immediately go unto his houſe, and ſhall enquire what goods he hath, and what corn he hath in his grange: and if he be a freeman, they ſhall enquire how much land he hath, and what it is worth yearly, and what corn he hath upon the ground; and when they have thus enquired, they ſhall cauſe all the lands, corn and goods to be valued, in like manner as if they ſhould be ſold immediately; and thereupon they ſhall be delivered to the whole townſhip, and they ſhall be anſwerable before the juſtices for all: and likewiſe of his freehold, how much it is worth yearly over and above the ſervice due to the lords of the fee; and the land ſhall remain in the King's hands until the lords of the fee have made fine for it. And immediately upon theſe things being enquired, the bodies of ſuch perſons being dead, ſhall be buried. *Stat.* 4 *Ed.* 1.

In like manner it is to be enquired of them that be drowned or ſuddenly dead; and after ſuch bodies are to be ſeen, whether they were ſo drowned or ſlain, or ſtrangled by the ſign of a cord tied ſtraight about their necks, or about any of their members, or upon any other hurt found upon their bodies; whereupon they ſhall proceed in the form aboveſaid. And if they were not ſlain, then ought the coroner to attach the finders, and all other in company. *Ibid.*

All wounds ought to be viewed, the length, breadth and deepneſs, and with what weapons, and in what part of the body the wound or hurt is, and how many be culpable, and how many wounds there be, and who gave the wound; all which things muſt be inrolled in the roll of the coroners. *Ibid.*

Concerning horſes, boats, carts, *&c.* whereby any are ſlain, that properly are called *deodands*, they ſhall be valued and delivered unto the towns, as before is ſaid. *Ibid.*

The

*The cuſtomary Charge to the Jury.*

Gentlemen,

YOU, who are ſworn, are by your oath to enqure of the death of this man, whether he died of felony or by miſchance; and if of felony, whether of his own act or of another's; and if by miſchance, whether by the act of God or of man; and if of famine, whether of poverty or common peſtilence, and from whence he came, and who he was; and if he died of another's felony, who were principals, and who acceſſaries, and whether the principals or acceſſaries fled or not, and if hue and cry were duly made, according to law, or not, and who threatened him of his life or members, and who were ſureties of the peace; or whether he died of long impriſonment or of pain, and by whom he was further from life and neareſt to his death; and ſo of all prevailing circumſtances that can come by preſumptions.

And in caſe he died by a hurt or a fall, or other chance by the act of God, ſo that he had no power to ſpeak before his death, then you ſhall enquire the finders, and who were his parents, relations or neighbours, and if he were killed there or elſewhere; and if elſewhere, by whom, and how he was thence brought, and the value and kind of the deodand, and to whoſe hand it came; for whatſoever was the cauſe of his death is deodand, except veſſels in the ſea; but the goods or money upon the horſe, in a mill, carts and houſes, are not accounted deodands.

You ſhould alſo enquire of acceſſaries, which are eight in number:

1. Thoſe who command.

2. Thoſe who conceal.

3. Thoſe who allow and conſent.

4. Thoſe who ſee and could prevent it.

5. Thoſe who help and are in the force.

6. Thoſe who are partners in the gain.

7. Thoſe who knew thereof, and did not interrupt or hinder it by forbidding or endeavoring to prevent it.

8. Thoſe who knowingly receive ſuch offenders. All which you are to enquire of. And I am obliged by my office to remind you of the laws againſt offenders, which are as follows, *viz.*

| | |
|---|---|
| If one man wilfully kill another. | Forfeits his lands and goods. |
| If a man kill or drown himself. | Forfeits goods and chattels only. |
| If any homicide happen to be wilful murder, which crime cannot be too ſeverely puniſhed. | The offender ought to loſe both life, land and goods. |
| But if it be found manſlaughter. | To have the benefit of his clergy, and ſo ſave his life, but ſhall forfeit his lands and goods. |

*Note*, The goods of ſuch offenders muſt be found, appraiſed and valued, and left in the town or village where ſuch offender dwelleth, until the offender be acquitted or convicted by due courſe of law; but the offender muſt have ſufficient out of them to keep him alive to anſwer his fact; and what remains afterwards, if the offender be convicted, thoſe to whom ſuch goods do belong by the law muſt have them, and diſcharge the county who had the care of them. And as for the offender's free land, after his conviction, his Majeſty muſt have *annum diem & vaſtum* therein, and after the lord of whom it is holden ſhall have it as an eſcheat.

After the charge is delivered, then command three proclamations to be made thus:

*IF any man can give evidence on the behalf of his Majeſty, how and in what manner* A. B. *here lying dead, came to his death, let him draw near and he ſhall be heard.*

The witneſſes appearing, adminiſter the following oath to them:

*THE evidence which you ſhall give to this inqueſt concerning the death of* A. B. *here lying dead, ſhall be the truth, the whole truth, and nothing but the truth.*

So help you God.

If the witneſſes be not ready, you may adjourn to another day, to the ſame or another place, to receive their evidence, binding the jurors by recognizance in 20*l.* each for their appearance.

*The*

*The Proceedings taken by the Coroner thereon.*

THE coroner muſt then ſend out his warrants to the witneſſes, commanding them to come and be examined before him, &c. and to teſtify their knowledge touching the matter in writing under their hands.

If their evidence concern a man's life, then muſt all the witneſſes be bound over in twenty pounds each at the leaſt, perſonally to appear at the aſſizes then next enſuing, to teſtify there their knowledge therein.

The Form of the Recognizance is thus.

Surry. THE *twenty-ſecond day of* May, *in the year*, &c. A. A. *of* C. *in the county of* Surry, *acknowledges himſelf to owe and to be indebted to our Sovereign Lord the King in the ſum of twenty pounds.*

The condition of this recognizance is ſuch, that if the ſaid *A. A.* do perſonally appear before the juſtices of aſſize and gaol-delivery, at the next aſſizes to be holden at ——— for the ſaid county, and then and there deliver his teſtimony touching the death of *A. B.* and do not depart thence without licenſe of the ſaid juſtices of the court, that then this recognizance to be void and of no effect; or elſe the ſame to ſtand and continue in full force and virtue.

Taken and acknowledged the twenty-ſecond day of *May*, &c. aforeſaid, before me *C. D.* gent. one of the coroners of the county aforeſaid.

*Obſervations.*

A Coroner has not any power to enquire of any acceſſaries after the fact, but he may of acceſſaries before the fact, as well as of the principals, and whether any of them ſo found guilty fled for the ſame; and if ſuch flight is found, the offender forfeits his goods and chattels, and the flight is not traverſable. *S. P. C.* 183.

After the felony found, the coroners deliver their inquiſition before the juſtices of the next general gaol-delivery in the county, and

the ſaid juſtices are to proceed againſt the murderers if they be in the gaol, or elſe they are to return the ſame inquiſition into the *King's Bench*; and if any coroner do not certify his inquiſition in ſuch manner, he forfeits one hundred ſhillings. 3 *H.* 7. *c.* 1.

Alſo every coroner upon any inquiſition before him found, whereby any perſon is indicted for murder or manſlaughter, or as acceſſary to the ſame before the fact, ſhall put in writing the effect of the evidence given to the jury before him, being material; and ſhall bind ſuch by recognizance to prove the ſame at the next gaol-delivery for the county, *&c.* *Stat.* 1 & 2 *Ph.* & *M. c.* 13.

Where-ever coroners act as judges, as in taking an inquiſition of the death of a man, *&c.* the act of any one of them who firſt proceeds in the matter is the ſame as if all had joined in it. And it is ſaid, after ſuch proceeding by one of them, the act of any other will be void. *S. P. C.* 53. *a.*

Where coroners are empowered to act miniſterially, as in the execution of any proceſs directed to them, through the default or incapacity of the ſheriff, their acts will be void if they do not all join. *S. P. C.* 52. *a.*

If there is any practice with the coroner to ſuppreſs the evidence, the *King's Bench* may ſet aſide the inquiſition upon his miſbehaviour: and if he omit or neglect to enquire, the Chief juſtice, as ſupreme coroner, may do it, or appoint commiſſioners; but then it muſt not be *(ſuper viſum corporis)* upon ſight of the body, if done by commiſſioners. 1 *Vent.* 182.

Where a coroner's inquiſition was quaſhed, he muſt make a new *ſuper viſum corporis*; but if he miſbehaves himſelf, and a *melius inquirendum* is granted, the inquiſition muſt be taken by the ſheriff or commiſſioners upon affidavits, becauſe none but a coroner can take an inquiſition *ſuper viſum corporis.* 1 Salk. 100.

A *melius inquirendum* is never granted after an inquiſition *ſuper viſum corporis* is filed, unleſs it is quaſhed upon oath made of a miſdemeanor in the coroner or jury. For an inquiſition *ſuper viſum corporis* is not traverſable, but an inquiſition upon a *melius inquirendum* may be traverſed, becauſe it is not taken *ſuper viſum corporis.* Carth. 72, 73.

And becauſe inquiſitions *ſuper viſum corporis* are not traverſable, but binding upon the executors or adminiſtrators of the deceaſed, the court of *King's Bench* will, if there appears to have been any unfair practice in taking the inquiſition, not only quaſh the inquiſition, but commit the coroner. *Strange* 69. 1 *Vent.* 352.

In ſome caſes a *melius inquirendum* may go to the ſheriff; as if they can bring an affidavit that the jury did not go according to their evidence, &c. 3 *Mod. Rep.* 80, 238.

If it be found before the coroner *ſuper viſum corporis*, that one was *felo de ſe*, the executors or adminiſtrators of the deceaſed cannot traverſe it. 3 *Inſt.* 55.

This inquiſition being final, the coroner ought to hear counſel and evidence on both ſides. 2 *Sid.* 90, 101.

Mr. *Yorke* moved for leave for the coroner to take up the body, and take a new inquiſition, according to 2 *Sid.* 101. *Salk.* 377. which was granted; and it was ſaid the coroner could not do it, without the leave of the court. *Strange* 167.

The court granted a rule for a coroner to take up a body, in order for a new inquiſition, the former having been quaſhed. *Strange.* 533.

A coroner returned an inquiſition, finding a *felo de ſe*, *non compos mentis*; and it was moved that he might be obliged to return the depoſitions; but the court refuſed to make any ſuch rule, there being nothing depending before them to make it neceſſary. 2 *Strange* 1073.

The coroner is to attend the aſſizes, and deliver to the clerk of the aſſize all inquiſitions of murder, and manſlaughter, and alſo all inquiſitions of *felo de ſe*, *per infortunium*, *ex viſitatione Dei*, and all inquiſitions whereby any deodands are found, in order that the clerk of the aſſize ſhould tranſmit them to his Majeſty's coroner and attorney of the court of *King's Bench*, to the end that proceſs may iſſue to bring in the deodand.

## *The Fees the Coroner has a Right to claim under the Statutes.*

THE Statute 3 *H.* 7. *c.* 1. reciting, that coroners had not, nor ought to have any thing by the law for doing their office, which oft-time had been the occaſion that coroners had been remiſs in doing their office; it was enacted, that a coroner ſhould have for his fee, upon every inquiſition taken upon the view of the body ſlain, *thirteen ſhillings and four-pence*, of the goods and chattels of him that is the ſlayer and murderer, if he have any goods; and if he have no goods, of ſuch amerciaments, as ſhall fortune any townſhip to be amerced for the eſcape of the murderer.

But the ſaid fee of *thirteen ſhillings and four-pence* due only upon an inquiſition taken upon the view of a body ſlain or murdered, and payable only out of the goods and chattels of the ſlayer or murderer, or out of the amerciaments impoſed upon the townſhip, if the murderer eſcape, being not an adequate reward for the general execution of the ſaid office, it was by the ſtatute 25 *G.* 2. *c.* 29. enacted, That for every inquiſition, (not taken upon the view of a body dying in a gaol or priſon) which ſhall be duly taken in *England*, by any coroner or coroners, in any townſhip or place, contributory to the rates directed by *ſtat.* 12 *Geo.* 2. *c.* 29. the ſum of 20 *s.* and for every mile which he or they ſhall be compelled to travel, from the uſual place of his or their abode, to take ſuch inquiſition, the further ſum of *nine-pence* over and above the ſaid ſum of *twenty ſhillings*, ſhall be paid to him or them out of any monies ariſing from the ſaid rates, by order of the juſtices of the peace, in their general or quarter-ſeſſions aſſembled, for the county, riding, diviſion or liberty, where ſuch inquiſition ſhall have been taken, or the major part of them; which order, the ſaid juſtices ſo aſſembled, or the major part of them, are authoriſed and directed to make, for which order no fee ſhall be paid.

That for every inquiſition, which ſhall be duly taken upon the view of a body dying in any gaol or priſon in *England* by any coroner or coroners of a county, ſo much money not exceeding *twenty ſhillings*, ſhall be paid to him or them, as the juſtices of the peace, in their general or quarter-ſeſſions aſſembled for the county, riding, or diviſion, wherein ſuch gaol or priſon is ſituate, or the major part of them, ſhall think fit to allow, as a recompence for his or their labour, pains and charges, in taking ſuch inquiſition, to be paid in like manner, by order of the ſaid juſtices, or the major part of them, out of any monies ariſing from the ſaid rates; which order the ſaid juſtices ſo aſſembled, or the major part of them, are authoriſed and directed to make, for which order no fee ſhall be paid.

That over and above the recompence by this act limited and appointed for inquiſitions taken as aforeſaid, the coroner or coroners, who ſhall take an inquiſition upon the view of a body ſlain or murdered, ſhall alſo have the fee of *thirteen ſhillings and four-pence*, payable by virtue of the ſaid ſtatute 3 *H.* 7. *c.* 1. out of the goods and chattels of the ſlayer or murderer, or out of the amerciaments impoſed upon the townſhip, if the ſlayer or murderer eſcape.

That no coroner, to whom any benefit is given by this act, ſhall by colour of his office, or upon any pretext whatſoever, take for his office doing in caſe of the death of any perſon, any fee or reward other than the ſaid fee of *thirteen ſhillings and four-pence*, limited by the ſaid ſtatute 3 *H.* 7. *c.* 1. and other than the recompence by this act appointed, upon pain of being deemed guilty of extortion.

That no coroner of the King's houſehold, and of the verge of the King's palaces, nor any coroner of the admiralty, nor any coroner of the county palatine of *Durham*, nor any coroner of the city of *London* and borough of *Southwark*, or of any franciſes belonging to the ſaid city, nor any coroner of any city, borough, town, liberty or franchiſe, which is not contributary to the rates directed by the ſaid *ſtat.* 12 *Geo.* 2. *c.* 29. or within which ſuch rates have not been uſually aſſeſſed, ſhall be entitled to any fee, recompence or benefit, given or provided for coroners; but that it ſhall be lawful for all ſuch coroners as are laſt mentioned, to have and receive all ſuch fees, ſalaries, wages and allowances, as they were entitled to by law before the making of this act, or as ſhall be given or allowed to them by the perſon or perſons by whom they have been or ſhall be appointed.

## *The Coroner's Fees in* London.

BY ſtatute 3 *H.* 7. it is provided, That no coroner demand or take any thing of any man for doing his office, yet the coroner of *London* uſually takes extraordinary fees.

The fees in *London* formerly were,

| | £. | s. | d. |
|---|---|---|---|
| Warrant for ſummoning a jury, | 0 | 2 | 6 |
| The inquiſition, | 0 | 6 | 8 |
| Coroner's fees, | 0 | 13 | 4 |
| Warrant or certificate to bury the body, | 0 | 2 | 6 |
| | 1 | 05 | 0 |

Theſe fees are now much enlarged according to the ability of the perſon who is to pay; but this only by cuſtom, and is thought an oppreſſion. *Bohun's Priv. Lond.* 68. *Green's Priv.* 214.

The coroners are likewiſe entitled to fees for the execution of all writs directed to them where the ſheriff is a party, related to either party, or otherwiſe intereſted in the ſuit, and generally take the like fees as the ſheriff takes in the like caſes, and among the reſt as follows:

| | £. | s. | d. |
|---|---|---|---|
| For the return of a writ of *venire facias*, | 0 | 2 | 6 |
| For the return of a writ of *diſtringas juratores* or *corpora juratorum*, | 0 | 12 | 0 |
| For the return of a *tales*, | 0 | 2 | 0 |

Prece-

# Precedents of Inquisitions.

## *For a Murder, on View of the Body.*

*Surry*, to wit, } AN inquisition indented, taken at *Southwark* in the county of *Surry* aforesaid, the twenty-first day of *April* in the year, *&c.* before me *C. L.* one of the coroners of our Lord the King for the county aforesaid, upon the view of the body of one *W. F.* then and there lying dead, upon the oath of *A. B. C. D. E. F. &c.* good and lawful men of the said county, who being sworn and charged to inquire on the part of our said Lord the King, when, where, how and after what manner the said *W. F.* came to his death, do say upon their oath, that one *F. J.* late of *H.* aforesaid, gent. and *A. G.* late of *H.* aforesaid, gent. not having God before their eyes, but being moved and seduced by the instigation of the Devil, on the nineteenth of *April* in the eighth year aforesaid, about the first hour in the night of the *same day*, with force and arms, and so forth, at *Southwark* in the said county aforesaid, in and upon the aforesaid *W. F.* then and there being in the peace of God and of the said Lord the King, feloniously, voluntarily, and of their malice fore-thought, made an assault; and that the aforesaid *F. J.* then and there with a certain sword made of iron and steel, of the value of five shillings, which he the said *F. J.* then and there had and held drawn in his right hand, the aforesaid *W. F.* in and upon the left part of the belly of the said *W. F.* a little above the navel of the said *W. F.* then and there violently, feloniously, voluntarily, and of his malice forethought, struck, thrust and pierced, giving to the said *W. F.* then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said *W. F.* a little above the navel of the said *W. F.* one mortal wound of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid *W. F.* then and there instantly died. And that the aforesaid *A. G.* then, *to wit*, on the said nineteenth day of *April*, in the eighth year aforesaid, at the time of the felony and murder aforesaid, by the aforesaid *F. J.* in form aforesaid, feloniously, voluntarily, and of his malice forethought done and perpetrated at *Southwark* aforesaid, in the county aforesaid, feloniously, voluntarily, and of his malice forthought, was present, abetting, assisting, aiding, comforting and maintaining the aforesaid *F. J.* to commit and perpetrate the felony and murder aforesaid, in form aforesaid, feloniously, voluntarily, and of his malice forethought; and so the jurors aforesaid, upon their oath aforesaid say,

that

that the aforeſaid *F. J.* and *A. G.* the aforeſaid *W. F.* on the ſaid nineteenth day of *April* in the year aforeſaid, at *Southwark* in the county aforeſaid, in manner and form aforeſaid, felonioufly, voluntarily, and of their malice forethought, killed and murdered, againſt the peace of the ſaid Lord the King that now is, his crown and dignity, and ſo forth. And the jurors farther ſay upon their oath, that the aforeſaid *F. J.* and *A. G.* at the time of the ſaid felony and murder, in form aforeſaid, felonioufly, voluntarily, and of their malice forethought, done and perpetrated, or ever afterwards to this time, had not, nor either of them ever had, nor as yet have or hath any goods or chattels, lands or tenements within the county of *Surry* aforeſaid, or elſewhere, to the knowledge of the ſaid jurors. In Witneſs whereof as well the aforeſaid coroner as the jurors aforeſaid have to this inquiſition put their ſeals, the day, year and place aforeſaid.

*E. S.* coroner.

*Another.*

*Eſſex*, to wit. } AN inquiſition indented, taken at *B.* in the county aforeſaid, on *Thurſday* the —— day of ——, in the —— year of the reign of, *&c.* before me *A. B.* gent. one of the coroners of our ſaid Lord the King, of the county aforeſaid, upon view of the body of one *C. D.* gent. there lying dead, by the oath of *E. F. &c.* ſworn, tried and charged to enquire how and in what manner the ſaid *C. D.* came to his death, who ſay upon their oath, that one *G. H.* of *B.* in the county aforeſaid, labourer, on the —— day of *Auguſt*, in the —— year, *&c.* at *B.* in the county aforeſaid, about the hour of ten in the fore-noon of the ſame day, not having God before his eyes, but moved and ſeduced by the inſtigation of the Devil, of his malice aforethought, felonioufly as a felon of our ſaid Lord the King, in and upon the ſaid *C. D.* in the peace of God and our ſaid Lord the King being, then and there with force and arms made an aſſault and affray, and that the ſaid *G. H.* with a certain ſword of the value of five ſhillings, which the ſaid *G. H.* in his right hand then and there held, then and there ſtruck the ſaid *C. D.* and with the ſaid ſword then and there gave the ſaid *C. D.* a mortal wound upon the left knee of the ſaid *C. D.* totally cutting off a certain bone of the ſaid knee, called the pan of the knee, of the length of four inches, and of the breadth of two inches, and of the depth of two inches, of which ſaid mortal wound the ſaid *C. D.* on the —— day of, *&c.* at *B.* aforeſaid in the county aforeſaid died; and ſo the ſaid jurors upon their ſaid oath ſay, that the ſaid *G. H.* felonioufly, and of his malice aforethought,

thought, killed and murdered the ſaid *C. D.* in manner and form aforeſaid, againſt the peace of our ſaid Lord the King, his crown and dignity; and the ſaid jurors upon their ſaid oath further ſay, that the ſaid *G. H.* at the time of the ſaid felony and murder was committed, had no goods or chattels, lands or tenements, in the county aforeſaid, to their knowledge. In teſtimony whereof, as well I the ſaid coroner, as the jurors aforeſaid, have to this inquiſition ſet our ſeals, the day, year and place aforeſaid, *&c.*

*Another.*

AN inquiſition, *&c.* upon view of the body of one *I. S.* there lying dead, by the oath of *A. B. &c.* jurors, ſworn and charged to enquire, how and in what manner the ſaid *I. S.* came to his death, who ſay upon their oath, that on, *&c.* at, *&c. W. L.* late of, *&c.* and *S. T.* late of, *&c.* as felons of our ſaid Lord the King, of their malice aforethought, made an aſſault upon the ſaid *I. S.* then and there being in the peace of God and our ſaid Sovereign Lord the King, and that the ſaid *W. L.* with a certain dagger of the value of 4 *d.* which he then and there had and held in his right hand, then and there ſtruck and ſtabbed the ſaid *I. S.* on the breaſt, under the left pap, then and there giving the ſaid *I. S.* a mortal wound of the breadth of one inch, and of the depth of four inches, whereof the ſaid *I. S.* then and there inſtantly died; and ſo the ſaid jurors upon their oath ſay, that the ſaid *W. L.* feloniouſly killed and murdered the ſaid *I. S. &c.* aforeſaid, in manner and form aforeſaid, againſt the peace of our ſaid Lord the King, his crown and dignity; and the ſaid jurors upon their ſaid oath further ſay, that the ſaid *S. T.* on, *&c.* aforeſaid, at, *&c.* aforeſaid, was preſent, aiding, aſſiſting, abetting, procuring, comforting and maintaining the ſaid *W. L.* in committing and perpetrating the ſaid felony and murder, in manner and form aforeſaid. In teſtimony, *&c.*

*On an Infant murdered, upon View of the Body.*

*Middleſex*, to wit. } AN inquiſition, *&c.* before me *R. R.* gent. one of the coroners of our ſaid Sovereign Lord the King in the ſaid county, upon view of the body of a certain male infant, (there lying dead) born of the body of *A. B.* late of *H.* in the county aforeſaid, upon the oath of *A. B. &c.* who ſay upon their oath aforeſaid, that the ſaid *A. B.* not having the fear of God before her eyes, but being moved and ſeduced by the inſtigation of the

the Devil, on *Friday*, &c. in the fifth year, &c. at *H.* aforesaid in the said county, did make an assault upon the male infant aforesaid, then and there being in the peace of God and of our said Sovereign Lord the King, and that the said *A. B.* did feloniously, voluntarily, and of her malice forethought, strangle and suffocate the said infant with her hand, of which said strangling and suffocation the said infant at *H.* aforesaid, in the said county, immediately died, and so, &c.

*An Inquisition upon one who was murdered in a Robbery.*

AN inquisition, &c. who say upon their oath, that on *Friday* the thirtieth day of *April*, in the sixth year, &c. it so happened, that a certain person unknown, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, with force and arms, &c. that is to say, with swords and daggers, between five and six of the clock in the forenoon of the same day, at *H.* aforesaid, in the county aforesaid, in the King's highway, there did make an assault upon the said *R. N.* then and there being in the peace of God and of our said Sovereign Lord the King; and the said person unknown did then and there feloniously strike the said *R. N.* upon the right part of his belly with a certain sword of the price of two shillings, which he then and there held in his hand, and did then and there give the said *R. N.* one mortal wound with the sword aforesaid, of the breadth of one inch, and of depth of two inches, of which said mortal wound the said *R. N.* then and there immediately died; and so the said jurors say upon their oath aforesaid, that the said person unknown, at *H.* aforesaid, in the county aforesaid, did feloniously kill and murder the said *R. N.* in manner and form aforesaid, against the peace of our said Sovereign Lord the now King, his crown and dignity. And the said jurors upon their oath further say, that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did fly away, against the peace, &c.

*Inquisition on one who hanged himself.*

——, to wit. INQUISITION, &c. who say upon their oath, that the said *H.* on the fourth day of *April*, in the —— year, &c. about the hour of four in the afternoon of the same day, not having God before his eyes, but being moved and seduced by the instigation of the Devil, at *T.* aforesaid, in a certain meadow

of one *I. K.* called *Edes Mede*, then and there being alone, took a certain hempen cord of the value of one penny in his hand, and then and there tied one end of the ſaid cord about his neck, and tied the other end thereof round a branch of a certain oak tree, and with the ſaid cord then and there voluntarily and felonioufly hung and ſtrangled himſelf; and ſo the ſaid jurors upon their ſaid oath ſay, that the ſaid *H.* then and there voluntarily and felonionſly, as a *felo de ſe*, murdered himſelf in manner and form aforeſaid, againſt the peace of our ſaid Lord the King, his crown and dignity, *&c.* and the ſaid jurors upon their ſaid oath further ſay, that the ſaid *H.* at the time of the ſaid felony had no goods or chattels in the county aforeſaid, to their knowledge. In teſtimony whereof, *&c.*

*If it be one who cut his own throat, then add after the words (being ſeduced by the inſtigation of the Devil.)*

AT *L.* aforeſaid in the ſaid county, did then and there felonioufly, voluntarily, and of his malice forethought, make an aſſault in and upon himſelf, then and there being in the peace of God and our ſaid Sovereign Lord the King; and that the ſaid *W. G.* did then and there felonioufly, voluntarily, and of his malice forethought, ſtrike himſelf upon his throat, with a certain knife of the value of one penny, which the ſaid *W. G.* then held in his right hand, then and there giving to himſelf one mortal wound with the ſaid knife upon his throat, of the breadth of four inches, and the depth of one inch, of which ſaid mortal wound the ſaid *W. G.* at *L.* aforeſaid in the ſaid county languiſhed, and languiſhing lived from the ſaid twenty-ninth day of *December*, in the ninth year above mentioned, at *L.* aforeſaid in the ſaid county, until the firſt day of *January*, in the ninth year aforeſaid, on which ſaid firſt day of *January* in the ninth year aforeſaid, at *L.* aforeſaid, in the county aforeſaid, the ſaid *W. G.* died of that mortal wound; and ſo, *&c.*

*If one drowns himſelf.*

AS *above*, *to*, at *L.* aforeſaid in the county aforeſaid, then and there being alone, in a common river there himſelf voluntarily and felonioufly drowned; and ſo the jurors aforeſaid upon their oath aforeſaid ſay, that the aforeſaid *S. K.* in manner and form aforeſaid then and there himſelf voluntarily and felonioufly as a felon of himſelf killed and murdered himſelf, *&c*

*When on one* non compos mentis, *thus:*

AN inquiſition, &c. who ſay upon their oath aforeſaid, that the ſaid *R. N.* on the day and year above-mentioned, and long before, that is to ſay, from the firſt day of *April* in the fifth year of the reign, &c. and until and on the ſaid ——— day, &c. being lunatick, and not of ſound mind, memory and underſtanding, did come alone to a certain river called *E.* river, at, &c. and did then and there voluntarily throw and caſt himſelf into the ſaid river, and was thereby then and there drowned; and ſo the ſaid jurors upon their ſaid oath ſay, that the ſaid *R. N.* came to his death by the cauſe aforeſaid, in manner and form aforeſaid. In teſtimony whereof, &c.

*On one who died in priſon.*

AN inquiſition, &c. who ſay upon their oath, that the ſaid *W. B.* who was before committed to gaol by Sir *T. P.* Bart. upon ſuſpicion of a certain felony having been committed by the ſaid *W. B.* and being then a priſoner in the ſaid gaol, for the cauſe aforeſaid, from the viſitation of God, died in the ſaid gaol on the day and year above mentioned; and ſo the ſaid jurors upon their oath ſay, that the ſaid *W. B.* came to his death in manner and form aforeſaid, and not otherwiſe. In witneſs, &c.

*Or thus:*

THAT the aforeſaid *A. P.* on the day of the taking of this inquiſition, being a priſoner in the gaol of our Lord the King of his caſtle of *Y.* in the county of *Y.* aforeſaid, then and there died of the viſitation of God, and then and there in manner and form aforeſaid came to his death, and not otherwiſe. In witneſs, &c.

An

*An inquiſition for killing another in his own defence.*

*Suſſex*, to wit. AN inquiſition, &c. who ſay upon their oath, that whereas one *G. L.* late of, &c. gent. at *L.* aforeſaid, on the thirty-firſt day of *December*, in the ninth year, &c. was in the peace of God and our Sovereign Lord the King, that the ſaid *H. B.* about two of the clock in the afternoon of the ſame day did come, and of his malice forethought did then and there make an aſſault upon him the ſaid *G. L.* and did then and there endeavour to have beaten and killed him the ſaid *G. L.* by continuing the aſſault aforeſaid, from the houſe of one *W. B.* in *L.* aforeſaid, to a certain place called, &c. in the ſaid county; and the ſaid *G. L.* ſeeing that the ſaid *H. B.* was ſo maliciouſly diſpoſed, fled to a certain wall in the ſaid place, called, &c. and could not eſcape from thence for fear of his death; and ſo the ſaid *G. L.* then and there continued to defend himſelf, in preſervation of his life, againſt the ſaid *H. B.* and in his own defence did ſtrike the ſaid *H. B.* upon the right part of his breaſt with a certain ſword of the price of one ſhilling, which the ſaid *G. L.* then and there held in his right hand, then and there giving to the ſaid *H. B.* one mortal wound of the breadth of one inch, and depth of three inches, of which ſaid mortal wound the ſaid *H. B.* at *L.* aforeſaid in the ſaid county languiſhed, and lived languiſhing from the ſaid thirty-firſt day of *December* to the fifth day of *January* from thence next enſuing; which ſaid *H. B.* on the ſaid fifth day of *January* in the ninth year above mentioned, at *L.* aforeſaid in the ſaid county, died of that mortal wound, and ſo the ſaid *G. L.* did then and there kill the ſaid *H. B.* in his own defence. In witneſs, &c.

*An inquiſition on one* per infortunium interfectum.

AN inquiſition, &c. who ſay upon their oath, that on the eleventh day of *Auguſt* in the twenty-ninth year of the reign of our Sovereign Lord *George* the ſecond, now King of *Great Britain*, &c. at *A.* in the county aforeſaid, between the hours of ſeven and eight in the forenoon of the ſame day, the ſaid *C. D.* with a certain axe, which he then had and held in his hands, cut and hewed down an oak tree then growing in a certain wood called *M.* at *A.* aforeſaid in the county aforeſaid, by reaſon of which cutting and hewing down of the ſaid oak, the ſaid oak then and there by misfortune fell upon the head of the ſaid *C. D.* giving to the ſaid *C. D.* one mortal wound on the left ſide of his head, of the length of three inches, of the width of two inches, and of the depth of one inch, of which ſaid

mortal wound the ſaid *C. D.* then and there inſtantly died; and ſo the ſaid jurors upon their ſaid oath ſay, that the ſaid *C. D.* came to his death by misfortune in manner and form aforeſaid; and further the ſaid jurors upon their ſaid oath ſay, that the ſaid oak is of the value of ten ſhillings, and that it lies in the aforeſaid wood, now in the tenure, cuſtody or occupation of *I. B.* of *A.* in the county aforeſaid, Eſquire. In teſtimony whereof, *&c.*

*Another inquiſition on one* per infortunium interfectum.

AN inquiſition indented, *&c.* who ſay upon their oath, that the aforeſaid *A. B.* on the ——— day of ———, in the ——— year of, *&c.* at *C.* aforeſaid, in the county of *S.* aforeſaid, going with his cart from *D.* in the county of *B.* to *E.* in the ſaid county of *S.* by the way between *D.* and *E.* aforeſaid, to wit, at *C.* aforeſaid in the ſaid county of *S.* his ſaid cart with the load fell upon the body of the ſaid *A. B.* and ſo bruiſed and cruſhed his body, that of the ſaid bruiſes and cruſhes the ſaid *A. B.* then and there inſtantly died; and ſo the ſaid jurors upon their ſaid oath ſay, that the ſaid *A. B.* came to his death by misfortune in manner and form aforeſaid; and the ſaid jurors upon their ſaid oath further ſay, that then and there four horſes with the ſaid cart and it's load, *to wit*, ſix packs or farthels of wool, containing by eſtimation four and twenty tods of wool, moved to the death of the ſaid *A. B.* and that the ſaid four horſes are of the price of 16*l.* and that the ſaid cart is of the value of 2*l.* and that the ſaid horſes and cart remain in the cuſtody of *G. W.* of *N.* and that the ſaid ſix packs or farthels of wool are of the value of 30*l.* and remain in the cuſtody of *I. N.* of *O.* in the county of *S.* clothier. In teſtimony whereof, *&c.*

*An information for the recovery of a debt due to a* felo de ſe.

*Warwickſhire*, to wit. BE it remembered, that Sir *T. F.* Knight, coroner and attorney of our Lord the King, in the court of our ſaid Lord the King, before the King himſelf, who for our ſaid Lord the King in this behalf proſecuteth, in his proper perſon cometh here into the court of our ſaid Lord the King before the King himſelf at *Weſtminſter*, on *Friday* next after the morrow of the *Holy Trinity* in this ſame term, and for our ſaid Lord the King giveth the court here to underſtand and be informed, that *E. L.* late of *L.* in the county aforeſaid, widow, not having God before her eyes,

but being moved and ſeduced by the inſtigation of the Devil, on the twenty-third day of *September*, in the fifteenth year of the reign of our Sovereign Lord *Charles* the ſecond, now King of *England*, &c. at *L.* aforeſaid, in the county aforeſaid, in and upon herſelf, in the peace of God and our ſaid Lord the King then and there being, then and there feloniouſly, voluntarily and of her malice aforethought, made an aſſault, and that the ſaid *E. L.* with a certain knife of the value of one penny, which the ſaid *E. L.* then and there had and held in her right hand, then and there feloniouſly, voluntarily, and of her malice aforethought, ſtruck and ſtab'd herſelf in and upon the throat of her the ſaid *E.* then and there giving to herſelf with the ſaid knife in and upon the throat, one mortal wound of the length of four inches, and of the depth of two inches, of which ſaid mortal wound the ſaid *E. L.* from the ſaid twenty-third day of *September*, in the fifteenth year aforeſaid, until the twenty-ſixth day of *September* then next following, at *L.* aforeſaid, in the county aforeſaid, languiſhed, and languiſhing lived; which ſaid *E. L.* on the ſaid twenty-ſixth day of *September*, in the fifteenth year aforeſaid, at *L.* aforeſaid, in the county aforeſaid, died of the ſaid mortal wound; and ſo the ſaid *E.* at *L.* aforeſaid, in the county aforeſaid, feloniouſly, voluntarily, and of her malice aforethought, and as a felon of herſelf, killed and murdered herſelf, againſt the peace of our ſaid Lord the preſent King, his crown and dignity, &c. as by a certain inquiſition lately taken before *J. Y.* gentleman, one of the coroners of our Lord the King, of the county aforeſaid, upon view of the body of the ſaid *E. L.* and delivered into the court of our Lord the King, before the King himſelf, by the proper hands of the ſaid coroner, more fully appears; and that *J. S.* late of *P.* in the county aforeſaid, yeoman, was indebted to the ſaid *E. L.* in the ſum of 80*l.* on the ſaid day of her death, as appears by a certain writing obligatory, ſealed with the ſeal of the ſaid *J.* and brought here into court, and bearing date the firſt day of *November*, in the fourteenth year of the reign of our ſaid ſovereign Lord the preſent King; yet the ſaid *J. S.* did not pay the ſaid ſum of 80*l.* or any parcel thereof to the ſaid *E.* in her life-time, nor in any manner ſatisfy her for the ſame; whereby an action on the caſe has accrued to our ſaid Lord the King, to have and demand of the ſaid *J. S.* the ſaid ſum of 80*l.* whereof the ſaid *J. S.* is to anſwer our ſaid Lord the King; whereupon the ſaid coroner and attorney of our ſaid Lord the King, for our ſaid Lord the King, prayeth the conſideration of the court here in the premiſes, and that due proceſs of law may be awarded againſt the ſaid *J. S.* in this behalf, to make him anſwer to our ſaid Lord the King, touching and concerning the premiſes aforeſaid; wherefore the ſheriff of the county aforeſaid, was commanded that he ſhould not omit, &c. but cauſe him to come to anſwer, &c.

*A Plea*

*A Plea to a* Scire Facias, *brought by an Adminiſtrator on a judgment, that the Plaintiff's Inteſtate was a* Felo de ſe, *and ſo the Debt forfeited to the King.*

——AND the ſaid *R.* ſaith, that the ſaid *R. T.* ought not to have his execution againſt him for the debt and damages aforeſaid, by pretext of the ſaid recovery, becauſe he ſaith, that after the rendering of the ſaid judgment, *to wit*, on the fourth day of *June*, in the year of our Lord one thouſand ſix hundred and fifty-five, at *London*, *to wit*, in the pariſh of *St. Buttolph Biſhopſgate London*, the ſaid *W. T.* with force and arms feloniouſly and voluntarily killed and murdered himſelf, againſt the peace of our ſaid Lord the now King, and that afterwards by a certain inquiſition indented, taken at *London* aforeſaid, *to wit*, in the pariſh and ward aforeſaid, on the fourth day of *June*, in the year of our Lord one thouſand ſix hundred and fifty-five, before *E. M.* gentleman, then coroner of the ſaid city of *London*, upon view of the body of the ſaid *W.* then and there lying dead, by the oath of *R. C. &c.* good and lawful men of the ſaid city, being then and there ſworn upon their oath before the ſaid coroner, to enquire when, where, and in what manner the ſaid *W. T.* came to his death, it was preſented, that the ſaid *W. T.* on the ſaid fourth day of *June*, in the year of our Lord one thouſand, ſix hundred and fifty-five aforeſaid, being by himſelf in his chamber in the houſe of *P. P.* gentleman, ſituated and being in the ſaid pariſh of *St. Buttolph Biſhopſgate*, in the ward aforeſaid, and not having God before his eyes, but moved and ſeduced by the inſtigation of the Devil, then and there, *to wit*, on the ſaid fourth day of *June*, in the ſaid year of our Lord one thouſand ſix hundred and fifty-five, took into his hand a certain piece of a bed-cord, of the value of one penny, and then and there did tye and faſten one end of the ſaid piece of bed-cord to a pillar of the window of the ſame chamber, and the other end of the ſaid piece of bed-cord about the neck of him the ſaid *W. T.* then and there ſtanding and being upon the ledge of the ſame window; and that he the ſaid *W. T.* one end of the ſaid piece of bed-cord being put, placed and faſtened upon the pillar of the ſaid window, and the other end of the ſaid piece of bed-cord being put, placed and faſtened about the neck of the ſaid *W. T.* in manner and form aforeſaid, feloniouſly, voluntarily, and as a *felo de ſe*, then and there did ſlide and throw down the body of him the ſaid *W. T.* from the ſaid ledge of the ſaid window, and by ſuch tying, placing and faſtening of both ends of the ſaid piece of bed-cord as aforeſaid, and by ſuch ſliding and throwing down of the body of the ſaid *W. T.* from the ſaid ledge of the ſaid window, he the ſaid *W. T.* then and there with the ſaid piece of bed-

bed-cord, voluntarily and felonioufly, and as a *felo de ſe*, hanged, choaked and ſtrangled himſelf, of which hanging, choaking and ſtangling, in manner and form aforeſaid, he the ſaid *W. T.* then and there, *to wit*, on the ſaid fourth day of *June*, in the year of our Lord one thouſand ſix hundred and fifty-five aforeſaid, in the pariſh and ward aforeſaid, inſtantly died, as by the ſame inquiſition returned into the court of our ſaid Lord the King, before the King himſelf now at *Weſtminſter* being and there remaining of record, more fully appears; by pretext of which felony on himſelf, and by force of the ſaid inquiſition taken before the ſaid coroner, the ſaid *W. T.* forfeited to our ſaid Lord Lord the King the ſaid 2000*l.* and 21*s.* And this the ſaid *R.* is ready to verify; Wherefore he prays judgment, if the ſaid *R.* ought to have his execution againſt him for the debt and damages aforeſaid, *&c.*

## *The Form of an Appeal of Murder.*

*Berks.* BE it remembered, that at the general delivery of the gaol of the Lord the King in the county of *Berks*, held for the ſaid county at *R.* in the county aforeſaid, the day, *&c.* in the tenth year of the reign of our Sovereign Lord *George* the ſecond, by the grace of God, of *Great Britain*, *France*, and *Ireland*, King, defender of the faith, *&c.* before Sir *A. B.* and *C. D.* Eſq; *&c.* juſtices of our ſaid Lord the King, aſſigned to hold pleas, *&c.* and juſtices of the ſaid Lord the King, his gaol there of the priſoners in the ſame being to deliver, aſſigned, *&c. J. A.* ſon and heir of *T. A.* deceaſed, in his proper perſon, by bill earneſtly appealed *R. D.* late of, *&c.* and *T. E. &c.* in the cuſtody of *J. W.* Eſq; ſheriff of the county aforeſaid, to the bar there brought in their proper perſons, of the death of the ſaid *T. A.* his father; and there are pledges of proſecuting his ſaid bill, that is to ſay, *J. D.* and *R. R.*; which ſaid bill follows in theſe words:

*Berks, ſſ.* *J. A.* ſon and heir of *T. A.* late of, *&c.* in the county of *B.* Eſq; in his proper perſon, earneſtly appeals *R. D.* late of, *&c.* gentleman, and *T. E.* late of, *&c.* in cuſtody of *J. W.* Eſq; ſheriff of the county of *B.* aforeſaid, being to the bar brought in their proper perſons, of the death of the ſaid *T. A.* his ſaid father; for that, that the ſaid *R. D.* not having God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day, *&c.* in the year of the reign, *&c.* with force and arms, *&c.* at the pariſh of, *&c.* in the county of *B.* aforeſaid, that is to ſay, in a certain place called, *&c.* in the King's highway there, upon the ſaid *T. A.* in the peace of God and

of

of our ſaid Lord the King, then and there being, felonioufly, wilfully, and of his malice forethought, made an aſſault, and the ſaid *R. D.* a certain piſtol of the value of ten ſhillings, then and there charged with gunpowder and a leaden bullet, which piſtol the ſaid *R. D.* in his right hand then and there held, felonioufly, wilfully, and of his forethought malice, directed againſt the ſaid *T. A.* he ſhot off and diſcharged, and with the ſaid leaden bullet, by force of the ſaid gunpowder, out of the piſtol aforeſaid, ſo as aforeſaid directed, ſhot and diſcharged, the ſaid *T. A.* in and upon the right ſide of the breaſt of him the ſaid *T. A.* near his right ſhoulder, then and there felonioufly, wilfully, and of his malice forethought, ſtruck, pierced and wounded, and then and there the ſaid *R. D.* with the ſaid bullet, ſo ſhot and diſcharged from the ſaid piſtol as aforeſaid, in and upon the ſaid right ſide of the breaſt of him the ſaid *T. A.* near his ſaid right ſhoulder, felonioufly, wilfully, and of his malice forethought, gave to the ſame *T. A.* one mortal wound, of the length and depth, *&c.* of which ſaid mortal wound the ſaid *T. A.* then and there inſtantly died. And the ſaid *T. E.* the ſaid day, *&c.* in the ſame year, at, *&c.* aforeſaid, in the place aforeſaid, and in the King's highway aforeſaid, there felonioufly, wilfully, and of his malice forethought, was preſent, abetting, aiding, comforting and maintaining the ſaid *R. D.* the felony and murder aforeſaid, in manner and form aforeſaid, to do and commit; and ſo the ſaid *R. D.* and *T. E.* the ſaid *T. A.* in manner and form aforeſaid, felonioufly, wilfully, and of their malice forethought, killed and murdered, againſt the peace of our ſaid Lord the King, his crown and dignity, *&c.* And as ſoon as the ſaid felons the ſaid felony and murder had committed, they fled; and the ſaid *J. A.* ſon and heir of the ſaid *T. A.* made freſh purſuit after the ſaid felons, *&c.* and if the ſaid *R. D.* and *T. E.* the felony and murder aforeſaid, ſo as aforeſaid done, are willing to avow and affirm, then the ſaid *J. A.* is ready the ſaid felony and murder againſt them the ſaid *R. D.* and *T. E.* to prove, according as the court of our ſaid Lord the now King here ſhall conſider thereof; and hath found pledges to proſecute his appeal, *&c.*

*Note.* An appeal muſt ſet forth, 1. In what part of the body the wound was given. 2. Of what length and depth, ſo that it may appear the wound was mortal. 3. That the party wounded died of that wound within a year and a day after the giving of the wound. If without wound, it is by weapon or without; by weapon, as by blow, bruiſing, *&c.* Without weapon, as by poiſoning, drowning, burning, ſtrangling, *&c.* in theſe and all other caſes the circumſtances muſt be ſet forth. 2 *Inſt.* 318. The year of the reign of the King, the day that one died, not the day of the wound, or blow. 3 *Inſt.* 53. The hour in the count upon the appeal, one may ſay about ten of the clock, *&c.* but you muſt not ſay about the day, year, or that the wound

wound or blow was about any part of the body. 3 Inſt. 53. 4 *Rep.* 41, 42. Time of the King; this is added notwithſtanding mention was made of the year before, where the blow, *&c.* was given: for here the year wherein death enſued is to be ſhewn, that it may appear that he died of the blow, *&c.* within the year and day. If the murder was in a town, it muſt be named; ſo if in a city, the pariſh muſt be alledged; but in the country, if a pariſh contain ſeveral towns, alledge it in a town, and with what weapon. The year to be computed by the kalendar months. The day is to be intended of the natural day. *Stat. Glouc. c.* 9. 6 *Edw.* 1.

## *A Warrant to take up a Body that has been buried and no Inquiſition taken.*

*Middleſex*, to wit. WHEREAS complaint hath been made unto me, that on the fourteenth day of this inſtant *June*, the body of one *J. D.* was buried within your pariſh, and that the ſaid *J. D.* died not a natural but a violent death, and no inquiſition having been taken on view of the body of the ſaid *J. D.* before his interment, as by the law of this land ought to have been done; *theſe are therefore* (by virtue of my office) to charge and command you in his Majeſty's name, that upon ſight hereof you immediately cauſe the body of the ſaid *J. D.* to be taken up, that I with my inqueſt may have a view thereof, and proceed therein according to law. *Hereof* fail not, as you will anſwer the contrary at your peril, and for your ſo doing this ſhall be your ſufficient warrant. Given under my hand and ſeal this twenty-fifth day of *June*, one thouſand ſeven hundred and ſeventy ſeven.

*J. C.* coroner.

To the conſtables and churchwardens of the pariſh of

*A Warrant for a Burial where a Perſon is found* Felo de ſe, *with the Return.*

*Middleſex*, ſſ. WHEREAS I with my inqueſt the day and year hereunder written, have taken a view of the body of one *A. B.* who hanged himſelf (*or as the caſe is*) in your pariſh, and whereas the jurors have found the ſaid *A. B.* to be a *felo de ſe*, theſe are therefore to will and require you, that you cauſe the body of the ſaid *A. B.* to be buried in ſome publick ſtreet or highway, according to law; and for your ſo doing this ſhall be your ſufficient warrant. Given under my hand and ſeal this ——— day of ——— one thouſand ſeven hundred and ſeventy-ſeven.

*To the churchwardens of the pariſh of* —— *or whom elſe it may concern.*

*The Return of the Churchwardens.*

BY virtue of the within warrant to us directed, we have cauſed the body of the within named *A. B.* to be interred in a place called ——————— near ———————, in the pariſh of ———————, in the King's highway, according to the laws of this land in that caſe made and provided. Given under our hands this ——————— day of ———————, one thouſand ſeven hundred and ſeventy-ſeven.

*C. D.* } *Churchwardens of*
*E. F.* } *the pariſh of.*

## A CASE determined in the *K. B.* as to the Jurisdiction of the Admiralty Coroner, and the County Coroner.

*The King against S. and another.*

AN information was prayed against one *S.* captain of the *B.* man of war, and also against the boatswain thereof, for refusing to let the coroner of *P.* and his jury come on board the said ship, in order to take a view, (and inquest thereon) of the body of a person who had hanged himself in the cabin of the ship, whilst she was at her moorings in water five fathom deep, and going to the dock to be cleared. And it appeared on the affidavits produced, that the ship was in full commission when this accident happened; that the body was removed from the place where it was found hanging, to prevent infection; and that the captain refused to suffer the coroner to take a view of the body in the ship, but only offered to let him take it on shore, and afterwards to come and see the place where the person died: and it also appeared that the body was buried secretly, and that the captain took several depositions relating to the fact, and sent them up to the admiralty; but it was not sworn that he caused any inquest to be taken.

It was argued against this motion by Dr. *P.* (the King's advocate) Sir *E. I.* a civilian, and several common lawyers, that it is easy to be proved from the laws of *Oleron*, and the ordinance made at *Queensborough*, and other ancient books of the civil law, that the admiralty hath jurisdiction within the place where this accident happened; but however, since this point is to be determined only by the authorities of the common law, they said, they would confine themselves to these: and the following were cited. *Stat.* 15. *R.* 2. *c.* 3. *Exton's Jurisdiction of the Admiralty*, *c.* 19, 4 *Inst.* 137. *Stat.* 28 *H.* 8. *c.* 15. 3 *Inst.* 113. 5 *Co.* 107. *a.* *Hale's P. C.* 16, *Hawk. P. C. B.* 2. *c.* 9. *sect.* 14. *Mich.* 28 *Car.* 2. An action was brought by the Earl of *S.* as Lord of the manor of *R.* against the marshal of the admiralty and others, for hindering the coroner of *S.* to take an inquisition of one who was killed by the falling of a ferry in the *Thames*; and there was a verdict for the defendants. [Which case Sir *E. L.* said, he had from a note in the admiralty.] And he said, that about two years before this last case, a question of the same nature came on before Lord *Hale*; but he declaring that the admiralty had a jurisdiction, it was not entered into. He also cited an opinion of the judges, upon a reference from the Queen in council,

*anno* 1713. (which is regiſtered in the admiralty) and the opinion is founded on conſideration of the ſtatutes of 5 *El. c.* 5. and 13 *Car.* 2. *c.* 9. and it is, that the admiralty hath a juridiction in all great navigable rivers from the bridges to the ſea; and that the ſaid ſtatute of *Car.* 2. is made for the government of ſhips, as well in time of peace as of war, and that perſons are puniſhable by martial law for the offences therein mentioned, which are committed either in the one or the other. This is ſigned by ten judges; *Ward* C. B. and *Gould* J. *diſſentientibus*; they being of opinion, that the miralty hath juriſdiction, not *a pontibus*, but from the points only. Suppoſing therefore, that the admiralty hath here a juriſdiction, the power of taking a view and inqueſt belongs to the admiraly coroner, who is generally the judge's marſhal, he being only a deputy to the judge, who derives his authority from the Lord High Admiral. And ſeveral clauſes in the letters patent granted to the late Prince *George* of *Denmark*, and afterwards to the Earl of *P.* (creating them Lord High Admirals) and alſo to the judge of the admiralty, were read, to ſhew that theſe perſons have the ſame office of coroner by ſea, with thoſe who are coroners by land. Sir *E. I.* alſo produced the following inſtances of inquiſitions, before the admiralty coroner, taken out of a large bundle of them in the admiralty, *viz.* one of a maid ſervant, who fell into the *Thames* as ſhe was waſhing her mop, and was drowned. Another of a man who was drowned in coming from *Wapping-wall.* Another of a man who was ſtabbed upon ſhore, and was found in the *Thames.* And laſtly, another who fell from the ſhore into the ſame river. It was alſo argued, that in the ſtatute of 28 *E.* 3. *c.* 6. of coroners, there is a ſaving to Lords and others, who ought to make coroners, of their ſeigniories and franchiſes. And in this caſe it is a material circumſtance, that the ſhip was in full commiſſion; there being no inſtance of a land coroner going aboard a ſhip in full commiſſion. [Of which an affidavit was produced.] Beſides, it appears here that the coroner was offered a view of the body in the ſhip, but was denied only to ſit therein as a court: and it is not neceſſary to take an inquiſition on the ſpot where the view is had, but may be taken in any other place afterwards. *Stat de officio coronatoris*, 4 *E.* 1. *Latch.* 166. S. C. *Poph.* 209. *Comb.* 386. And as this a mere matter of right in queſtion, it is more proper to be tried in an action, or a *quo warranto*, than in an information for a miſbehaviour.

On the other ſide it was argued by the Solicitor General *S.* and Mr. *W.* that the admiralty hath no juriſdiction, but only *ſuper altum mare*, unleſs it be in the caſes of murder and maihem; and this by ſtatute of *R.* 2. 4 *Inſt.* 137, 141. *Owen* 122. *Moor* 892. *Hale's P. C.* 171. And where both the ſtroke and death are on the ſea, the admiralty hath only a concurrent juriſdiction. *Hale's P. C.* 16, 54. in ſuch caſe therefore if the admiralty coroner refuſes the other coroner

roner to take an inquiſition, and doth not take one himſelf, it is a great miſdemeanor; and this is the preſent caſe. As to the objection, that the ſhip was here in full commiſſion; this makes no difference, becauſe the juriſdiction ariſes only from the place. *Hob.* 213. And it is very plain, that the coroner hath a right to go to the place to ſee the body before its removal; and if he omits this, he is actually fineable, tho' he may adjourn the court to another place to take depoſitions. *Stat. de officio coronatoris*, 4 *E.* 1. *Bract.* 121. *Fleta, lib.* 1. *c.* 25. *Stat.* 33. *H.* 8. *c.* 12. 2 *Hale's Hiſt. P. C.* 58. And in the Earl of *Eſſex*'s caſe, (who was killed in the *Tower*) there was a great complaint made, that the body was dreſſed, and removed from the room and poſition it was in when it came to its end, before notice was given to the coroner. As to what is here ſaid, that an action may be brought, this will be no ſatisfaction to the public.

And the whole court were clearly of opinion, that an information ought to be granted: for ſuppoſing that the admiralty hath a juriſdiction in the place now in queſtion, [of which no opinion was given] yet (they ſaid) it is plain by the caſes which have been cited, (with which *Stamf. P. C.* 51. *b.* agrees) that the land coroner hath a concurrent one. In the ſtatute of *R.* 2. which gives the admiralty a juriſdiction in great rivers in the caſes of death and maihem, there are no excluſive words of the coroner of a county, and conſequently his antient juriſdiction remains; neither is any mention therein made of a ſhip's being in or out of commiſſion, which (as *Lee* C. J. obſerved) ſeems to be a diſtinction founded only on the laſt proviſion in the ſtatute of *Car.* 2. nor can this make any difference in the preſent caſe, unleſs the judge of the admiralty hath actually appointed a deputy coroner to be in the ſhip when in commiſſion, which doth not appear. In this caſe then, the land coroner hath been refuſed the executing a lawful authority, and without any inquiſition being taken on the other ſide. And (as *Probyn* J. ſaid) in the caſe of a concurrent juriſdiction, he who firſt exerciſes it ought not to be hindered or interrupted therein; and his execution thereof is a good excuſe to the other in not doing any thing in the matter. And ſuppoſing that the admiralty hath in this caſe the ſole juriſdiction, here hath been a great breach of duty.

The court ſaid further, that tho' no imputation is here laid on the captain as wilfully oppoſing juſtice, but only as acting under a miſapprehenſion of having a right to do as he hath done; yet as this is a matter of great and public concern, an information is proper. For (as *Lee* C. J. ſaid) an information is grantable not only where things are done maliciouſly or forcibly, but alſo where perſons are hindered or refuſed the exerciſing a lawful authority, as where a *mandamus* is not complied with: tho' in caſes of a private nature, where

there hath been no apparent deſign of doing wrong, an information hath indeed been often denied. And C. J. ſaid, that it ſeems very difficult to maintain an action in this caſe; and that he remembered a caſe, where an action was brought for refuſing to admit a perſon into a veſtry room; and it was greatly debated, whether the action was maintainable, but never determined.

It was alſo ſaid by the C. J. that, in caſe of an untimely death, a view ought to be had as ſoon as may be after the fact committed, and (if poſſible) whilſt the body is in the ſame poſition, and other circumſtances, it was in when the perſon died; and is the duty of perſons in whoſe houſes ſuch accidents happen, to give immediate notice to the proper officer for this purpoſe: but in the preſent caſe, he ſaid, a good reaſon is given for removal of the body, *viz.* that this was done to prevent infection.

An information was therefore granted againſt the captain, but not againſt the boatſwain; nor was it much preſſed againſt him by the proſecutor's counſel, as he acted only by the order of the captain.

Ex. G. A. A.

FINIS.